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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY,

Petitioners,

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners,

—against—

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners——Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Corporation and The Upjohn Company——respectfully pray that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit, entered on February 15, 1972, denying petitioners' application for a writ of mandamus directing the Honorable Miles W. Lord, United States District Judge for the District of Minnesota, to disqualify himself from presiding over any further proceedings in this multidistrict, antitrust damage litigation.

Opinion Below

The opinion of the Court of Appeals has not been officially reported. It appears in the Appendix hereto (3a-30a). No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals denying petitioners' mandamus application (1a-2a) was entered on February 15, 1972. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

When a Court of Appeals concludes that a district judge, in the course of pretrial proceedings, has "shaken petitioners' confidence in his impartiality" and has caused the petitioners reasonably to believe that he "has improperly prejudged the case," may it nevertheless, despite the provisions of 28 U.S.C. § 144 and the due process guarantee of a fair and impartial tribunal, require petitioners to submit their cause for further pretrial and trial before that judge?

Constitutional Provision and Statute Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Section 144 of the Judicial Code, Title 28, provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Statement of the Case

The Court of Appeals found that the petition to disqualify Judge Lord presented "a close case" and that the "record adversely reflects upon Judge Lord's conduct" (29a). Although it concluded that Judge Lord has "shaken petitioners' confidence in his impartiality" and seems to have left "the impression that he has improperly prejudged the case" (29a), the Court of Appeals declined to order disqualification. Petitioners seek review by this Court of that decision.

1. *Background*

This petition arises out of events occurring in the course of coordinated pretrial proceedings in fifty-six antitrust damage actions which have been brought against five

pharmaceutical manufacturers (the petitioners) by a number of different categories of plaintiffs, including a large number of private entities, various state governments and the United States. The plaintiffs generally allege that all petitioners conspired to restrain trade and monopolize the market for broad spectrum antibiotic drug products and that, as a part of such conspiracy, certain of the petitioners made false and misleading statements to the Patent Office in prosecuting applications for an important product patent.

These actions and approximately one hundred others grew out of Federal Trade Commission proceedings instituted in 1958[1] and a criminal antitrust action brought by the United States in 1961.[2] At one time, all of the damage actions were coordinated for pretrial proceedings in the Southern District of New York before the Honorable Inzer B. Wyatt, with whose approval a majority of the cases were settled.[3]

Following Judge Wyatt's approval of the first large settlement, plaintiffs in these "non-settling" cases petitioned the Judicial Panel on Multidistrict Litigation for

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[1] *Matter of American Cyanamid Company, et al.*, Dkt. No. 7211 (complaint filed July 28, 1958), *order vacated and remanded*, 363 F.2d 757 (6th Cir. 1966), *order after remand aff'd sub nom. Chas. Pfizer & Co. v. F.T.C.*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

[2] *United States v. Chas. Pfizer & Co.*, 61 Cr. 772 (Indictment returned August 17, 1961), *rev'd for new trial*, 426 F.2d 32 (2d Cir. 1970), *prior en banc hearing order vacated, opinion of panel modified and petition for rehearing denied*, 437 F.2d 957 (1970), *aff'd by equally divided court*, —— U.S. ——, 40 U.S.L.W. 3348 (Jan. 24, 1972).

[3] *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D. N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

a re-transfer of their cases under 28 U.S.C. § 1407 from the Southern District of New York to the District of Minnesota for the completion of coordinated pretrial proceedings. Although the Panel denied plaintiffs' motion as such, it did reassign the non-settling cases to Judge Lord of the District of Minnesota, who was specially assigned to the Southern District of New York. *In re Antibiotic Drugs*, 320 F. Supp. 586 (J.P.M.L. 1970). Subsequently, *sua sponte* and over petitioners' objections, Judge Lord transferred forty-nine of the cases to the District of Minnesota, for the completion of pretrial and for trial, pursuant to 28 U.S.C. § 1404(a). That action was approved by the Second Circuit Court of Appeals in *Pfizer Inc. v. The Hon. Miles W. Lord*, 447 F.2d 122 (2d Cir. 1971).

2. *The Proceedings Below*

On September 17, 1971, the petitioners, pursuant to 28 U.S.C. § 144, filed a formal application in the District Court requesting Judge Lord to recuse himself. The application was based on a series of incidents, recounted in affidavits submitted by petitioners and their counsel (31a-76a), which had convinced them that Judge Lord had prejudged the merits of these cases and had assumed the role of a prosecutor and advocate of plaintiffs' cause.

On September 20, 1971, Judge Lord denied petitioners' application "for legal insufficiency," without an opinion.

On October 13, 1971, the petitioners applied for a writ of mandamus in the United States Court of Appeals for the Eighth Circuit, asking that court to direct Judge Lord to recuse himself. Judge Lord did not respond to the petition, but the plaintiffs-respondents filed lengthy opposing

briefs. After several months of deliberation, on February 15, 1972, the Court of Appeals issued a twenty-six page opinion denying the relief sought but taking the District Court to task for most of the events of which petitioners had complained.

3. *The Findings of the Court of Appeals*

After first determining that the petition should be considered on the merits, the Court of Appeals commented at length regarding the record, which it observed "adversely reflects upon Judge Lord's conduct during pretrial proceedings" (29a).

The court found that Judge Lord's "gratuitous and wholly extraneous" attack on the United States Patent Office as "'the sickest institution . . . ever invented'" was "totally injudicious." It said: "These words should not have been spoken, and we wholly disapprove of them."[4] (25a)

The court found that "[t]he record manifests Judge Lord's obvious perturbation over the contemplated settlement" of the civil suit brought by the United States government. "His words were strong." (24a) He "misconceived his role vis-a-vis the settlement" (24a), and he

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[4] Judge Lord not only asserted this strong personal belief "for the record and posterity," but he also characterized the Patent Office as "the weakest link in the competitive system in America" and asked the Antitrust Division to investigate "what is happening to the Patent Office" (50a). Because the propriety of certain petitioners' prosecution of antibiotic patents is a central issue in these antitrust cases, petitioners are convinced that Judge Lord's strong views would make it impossible for him to preside impartially.

"expressed his displeasure at having his 'game plan' upset" (22a).[5]

The court found that Judge Lord's threats to a witness at a deposition were "inappropriate" (17a), "prematurely made during pretrial proceedings and therefore unfair," and a "type of prejudgment."[6] (18a)

The court observed that while Judge Lord's remark, "'it would not bother me to find that lawyers were part of the conspiracy' does not directly cast any aspersions upon defense counsels' integrity, . . . [it] might be so interpreted" (29a n11).

"Because Judge Lord's conduct and comments may have discouraged settlements between the parties" (25a), the court deemed it necessary to admonish Judge Lord "not to impede any fair settlement of any of the cases presently before him" (27a).[7]

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[5] Judge Lord took aggressive steps to attempt to dissuade the Government from settling its action. Among other things, he suggested that, by settling, the Government would be permitting petitioners to "buy a monopoly," and threatened "another proceeding, or, at least some moves" against petitioners "to vindicate the integrity of the judicial system" for "the fraud committed on the court" (45a-46a, 48a).

[6] Judge Lord suggested openly that the witness was evasive and lying and threatened to fine the witness. After the deposition, Judge Lord stated his belief that the witness' testimony denying the charges of fraud was inherently incredible (38a-44a).

[7] Counsel for Hawaii proposed to settle with petitioners on the same basis as previously accepted by the attorneys general of forty-three states and approved by Judge Irizer B. Wyatt of the Southern District of New York and the Court of Appeals for the Second Circuit. In an *ex parte* telephone conference, Judge Lord advised counsel for Hawaii that the Court would refuse to approve that settlement or any settlement at that dollar level. The settlement offer was thereupon withdrawn. (51a-52a)

The Court of Appeals concluded that "[c]learly, some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality" (29a), and that he seems to have left "the impression that he has improperly prejudged the case" (29a). The court also found that petitioners had sought recusal in "sincerity and good faith" (29a).

Despite all these findings, the court concluded that "[t]he facts contained in petitioners' affidavit fall short of showing the bias and prejudice needed to recuse" (28a).

Reasons for Granting the Writ

I

This petition raises the question whether the disqualification statute, 28 U.S.C. § 144, and the Constitution compel disqualification of a judge whose actions and conduct have created a clear appearance of bias and prejudice. The purpose of Congress in enacting 28 U.S.C. § 144, as confirmed by this Court in *Berger* v. *United States*, 255 U.S. 22 (1921), was to provide not only that the tribunals of the country shall be impartial in fact, but that they "shall give assurance that they are impartial." 255 U.S. at 36. Given the findings of the Court of Appeals, Judge Lord's conduct and statements, at the very least, created a substantial appearance of bias and consequently require his disqualification.

Due process grants all parties the unqualified right to have their controversies resolved before an impartial court. *In re Murchison*, 349 U.S. 133 (1955); *Tumey* v. *Ohio*, 273 U.S. 510, 522 (1927); *Jordan* v. *Massachusetts*, 225 U.S.

167, 176 (1912). The strength of the judicial system depends on the confidence of litigants and the general public that courts are exercising their important powers fairly and disinterestedly. "[J]ustice must satisfy the appearance of justice." *Offut* v. *United States*, 348 U.S. 11, 14 (1954); *Commonwealth Coating Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1965).

In enacting 28 U.S.C. § 144, Congress supplemented and implemented this Constitutional guarantee by creating a procedure and remedy in advance of trial for a litigant with reason to believe that the judge to whom his cause is assigned is prejudiced against him. Representative Cullop of Indiana, chief sponsor of the legislation, made that purpose explicit when he declared:

> "I can conceive no greater wrong imposed upon a citizen, however high or humble, than to compel him to submit his cause, an important matter to him, to a court in which he fears justice will not be administered to him." 46 Cong. Rec. 306 (1910).
>
> "[T]his amendment is very essential, in my judgment, for the protection of the courts from criticism. . . . This amendment seeks to remove from the court[s] that criticism, that parties may have relief from judges in whom they have not confidence in their impartiality and freedom from prejudice . . ." 46 Cong. Rec. 2627 (1911).

In *Berger* v. *United States*, 255 U.S. 22 (1921), this Court's only comprehensive interpretation of the statute, the Congressional purpose was similarly described:

> "[I]ts solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are

> impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment." 255 U.S. at 35-36.

Because the disqualification statute is directed at the appearance of bias, this Court in *Berger* held it improper for a judge, responding to a recusal petition, to conduct an inquiry into the accuracy and completeness of the allegations of bias in an effort to show that the litigant's apprehension of prejudice was mistaken and that the judge was in fact impartial. Rather, the requirement of an affidavit averring the facts and reasons in support of the conclusion of bias was included in the statute as "a precaution against abuse" rather than to submit "the reality and sufficiency of the facts . . . to the judgment of the judge." 255 U.S. at 33.

If the facts and reasons averred in the affidavit are "not frivolous or fanciful but substantial and formidable" and "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment," recusal follows without more. *Id.* at 33-34.

II

Rather than disqualifying the judge when the affidavit demonstrates an appearance of bias on his part, however, many lower federal courts, including the Court of Appeals here, have misapprehended their task as including a review of the disqualification application on the merits to determine whether the judge will in fact ultimately be able to afford movants a fair trial. Such judicial efforts to determine whether bias in fact exists have unnecessarily put the honor and integrity of the challenged judge in issue.[8] The re-

[8] *Wolfson* v. *Palmieri*, 396 F.2d 121, 125 (2d Cir. 1968); *United States* v. *Parker*, 23 F.Supp. 880, 882-83 (D.N.J. 1938).

sulting inquiry has a demoralizing effect on both the trial judge and the appellate courts.[9] Because courts have been reluctant to disqualify a fellow judge, they have instead interpreted the statute narrowly and artificially to deny recusal.[10]

A number of lower courts have further strayed from the statutory standard by requiring litigants to prove that the asserted prejudice stems from an exclusively extrajudicial source.[11] In determining that petitioners' affidavits "fell short of showing the bias and prejudice needed to recuse," the Court of Appeals relied upon the proposition that an applicant must prove that the prejudice derived solely from exposure to something outside the case itself. For example, although the court below strongly disapproved of Judge Lord's "totally injudicious" remarks concerning the Patent Office (25a), it speculated that "even if . . . these comments disclose a prejudicial attitude concerning the Patent Office, these observations *may* have come as a result of Judge Lord's exposure to the prior proceedings" (25a, emphasis added) and therefore were insufficient to disqualify. This result is irreconcilable with *Berger* because it ignores the overriding concern that judges appearing to be prejudiced should be disqualified.

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[9] *Green* v. *Murphy*, 259 F.2d 573 (3d Cir. 1958); *United States* v. *McManus*, 298 F.Supp. 449, 457 (D. Iowa 1968).

[10] See *Cole* v. *Loew's Inc.*, 76 F.Supp. 872 (S.D. Cal. 1948), *aff'd*, 185 F.2d 641 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951); *Scott* v. *Beams*, 122 F.2d 777, 787, 788 (10th Cir. 1941), *cert. denied*, 315 U.S. 809 (1942); *Skirvin* v. *Mesta*, 141 F.2d 668, 672 (10th Cir. 1944); Orfield, *Recusation of Federal Judges*, 17 Buffalo L. Rev. 799, 805 (1968); Note, 47 Mich. L. Rev. 846 (1949).

[11] Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435, 1447 (1966).

The court below drew support for its "extrajudicial" test from language in *United States* v. *Grinnell*, 384 U.S. 563 (1966). However, that case merely reaffirmed the time-tested rule that disqualifying bias under the statute may not be based upon a judge's rulings in the case, citing *Berger* v. *United States*, *supra*, 255 U.S. at 31, which in turn relied upon *Ex parte American Steel Barrel*, 230 U.S. 35, 43 (1913).[12]

Many lower courts have so stringently construed the "personal" requirement of the statute that neither bias against the litigant's cause nor a prejudgment of the merits of the controversy is sufficient to disqualify. Instead, they have required the litigant to demonstrate that the judge dislikes him as a person.[13] This concept may have found

[12] The limited nature of the rule restated in *Grinnell* is underscored by the unusual circumstance which confronted the Court in that case. At the insistence of the defendants, the trial judge in *Grinnell* had reviewed the Government's case in order to provide guidance to both sides as to the relief to be granted in the event the Government prevailed. Disturbed by the strong adverse views developed and stated by the trial judge as a result of that exercise, the defendants sought to have him recused pursuant to the statute. The Court affirmed the trial judge's refusal to recuse himself on the basis of the settled principle that the bias or prejudice which can be urged for disqualification must be based upon something other than rulings.

[13] *Cole* v. *Loew's Inc.*, 76 F.Supp. 872, 876 (S.D. Cal. 1948) "a personal attitude of enmity directed against the suitor making the application"; *Saunders* v. *Piggly Wiggly Corp.*, 1 F.2d 582, 584 (W.D. Tenn. 1924) "such personal dislike of a litigant as an individual or a party to the suit, or such a personal favoritism or regard for some opposite party"; *Price* v. *Johnston*, 125 F.2d 806, 811-12 (9th Cir.), *cert. denied*, 316 U.S. 677 (1942); *Henry* v. *Speer*, 201 Fed. 869, 872 (5th Cir. 1913); *United States* v. *16,000 Acres of Land*, 49 F.Supp. 645 (D. Kan. 1942); *United States* v. *Valenti*, 120 F.Supp. 80 (D. N.J. 1954); *United States* v. *Gilbert*, 162 F.Supp. 384 (M.D. Pa. 1958); *Parker* v. *New England Oil Corp.*, 13 F.2d 497 (D. Mass. 1926); Schwartz, *Disqualification for*

its way into the rationale of the court below. Thus; despite Judge Lord's "strong" words and his "obvious perturbation" over the proposed settlement of the United States suit, the court did not consider his attitude to be of a disqualifying kind since "his ire seems directed not at petitioners but at the government. . . ." (24a) This ignores the crucial fact that his actions, particularly when viewed in the light of his strong views regarding the Patent Office, disclosed a "bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States, supra,* 255 U.S. at 34.

III

The effect of the development by lower federal courts of the artificial tests discussed above has been to eviscerate the disqualification statute by making it unavailable to litigants even where, as here, the trial judge clearly appears to be biased. The decision below demonstrates that such tests impose an impossible burden of proof on the party seeking to show bias, since he lacks the power to examine a judge and inquire into the genesis of his personal motives.[11] Nor would it be sound judicial policy to require a litigant to undertake such an investigation of a judge even if procedures were available for that purpose. Thus the practical effect of the restrictive tests applied by lower courts has been to limit the utility of the statute to those rare instances in which the trial judge himself discloses the

Bias in the Federal District Courts, 11 U. Pitt. L. Rev. 415, 417 (1950); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435 (1966).

[11] Recognition of this limitation provided a basis for decision in *Berger* v. *United States, supra*, 255 U.S. at 34.

source of his prejudice or overtly demonstrates his dislike of the litigant as a person.

Since the *Berger* decision is now more than fifty years old, and since lower courts have in the meantime strayed so far from the standards announced in that case, it is necessary that this Court now examine the subject of disqualification anew and, we respectfully submit, reaffirm *Berger* in clear and unequivocal terms. The need for such intervention by this Court to give effect to the disqualification statute has been frequently noted by legal commentators. Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. Pitt. L. Rev. 415, 418-20 (1950); Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 630 (1947); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435 (1966); Note, 47 Mich. L. Rev. 846 (1949).

This litigation in its present posture affords an unusually suitable vehicle to accomplish that purpose.

First, the Court of Appeals made detailed findings on the facts averred in petitioners' affidavits in support of their showing that Judge Lord is biased. It found ultimately, moreover, that "clearly, some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality," and that petitioners, in "sincerity and good faith," are under the "impression that he has prejudged the case" (29a). The comprehensive nature of these findings by the Court of Appeals presents a record permitting a clear restatement of the proper standards to be applied.

Second, since the litigation is in the pretrial stage, the question presented emerges in clear relief, unclouded by the many and diverse complex questions of fact and law

that will arise during trial on the merits and that inevitably will tend to obscure the question.[15]

Finally, this litigation poses extraordinary problems of judicial administration. It will require a substantial commitment of judicial resources for an extended period until disposed of. A number of important, often novel, questions of considerable interest to the public and to the bar alike are involved, including the series of legal questions presented by the enormous consumer class actions. In these circumstances, it is particularly appropriate for this Court to determine whether the litigation should remain in the control of a judge who, at the least, has created a clear appearance of bias and prejudice.

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[15] Moreover, as the United States, one of the plaintiff-respondents, observed in its answering papers before the Court of Appeals, interlocutory review of this question is peculiarly appropriate in the unique circumstances of this litigation:

> "[R]ather than leave such a serious charge unresolved throughout this lengthy litigation, the United States believes that the writ may properly be used here to review Judge Lord's denial of petitioners' motion." Answer of United States on Petition for Writ of Mandamus at 10 n2.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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April 6, 1972

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1580

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, and THE UPJOHN COMPANY,

Petitioners,

—v.—

HONORABLE MILES W. LORD, United States District Judge,

Respondent,

and

STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Respondents.

On Petition for a Writ of Mandamus to Disqualify The Honorable Miles W. Lord as Judge in These Cases.

This matter came on for consideration before this Court on a petition for writ of mandamus to disqualify the Honorable Miles W. Lord as Judge; the answers thereto; motion of respondents for damages and costs and response thereto, and transcripts and depositions filed in the United States District Court for the District of Minnesota.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the petition for writ of mandamus be and is hereby denied, in accordance with per curiam opinion of this Court filed herein.

And it is further ordered that the motion of respondents for damages and costs in this matter be and is hereby denied.

February 15, 1972

A true copy.

Attest:

ROBERT C. TUCKER
Clerk, U. S. Court of Appeals, 8th Circuit.

by H. F. GRUENINGER
Chief Deputy

March 27, 1972

Opinion Dated February 15, 1972

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 71-1580

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY,

Defendants-Petitioners,

—v.—

HONORABLE MILES W. LORD, United States District Judge,

Respondent,

and

STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Plaintiffs-Respondents.

On Petition for a Writ of Mandamus to Disqualify The Honorable Miles W. Lord as Judge in These Cases.

February 15, 1972.

Before:

MATTHES, *Chief Judge,*
BRIGHT and ROSS, *Circuit Judges.*

PER CURIAM.

Petitioners, Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Corporation, and The Upjohn Company, manufacturers of drugs, bring this action, seeking a writ of mandamus pursuant to the All Writs Statute, 28 U.S.C. §1651, and FRAP Rule 21 directing the Hon. Miles W. Lord, District Judge for the District of Minnesota, to recuse himself from presiding over the above entitled cases. Before instituting this action, petitioners, on September 20, 1971, filed moving papers and affidavits pursuant to 28 U.S.C. §144, asking Judge Lord to disqualify himself for reasons of bias and prejudice. Judge Lord orally denied the motion for "legal insufficiency." Although Judge Lord has declined to respond to petitioners' allegations, respondents, who are plaintiffs in the pending actions, have filed answers objecting to the issuance of the writ. In a separate motion, respondents seek damages and costs allegedly suffered by reason of delay to the proceedings attributable to the filing of petitioners' action.

We have carefully examined the petition, the underlying joint affidavit, the responses thereto, and portions of the record pertinent to petitioners' claims. We reach the merits of the petition and deny petitioners the relief requested. We also deny respondents' motion for damages. We do, however, deem it appropriate to comment on certain aspects of this case.

In a separate action filed contemporaneously, petitioners seek a writ of mandamus as a means of obtaining relief from a discovery order issued by Judge Lord which requires disclosure of certain documents and papers which

petitioners claim to be covered by the attorney-client privilege. Our opinion in that controversy, No. 71-1581, and our opinion in this case are filed together.

I.

Background of the Present Litigation

The present lawsuits involve forty-nine civil antitrust damage actions which have been brought by a number of different categories of plaintiffs, including the United States, states, wholesalers and retailers, insurance companies, private hospitals, agricultural purchasers, and competitors. These actions, and approximately one hundred others, most of which now have been settled, grew out of Federal Trade Commission proceedings instituted in 1958[1] and a criminal antitrust action brought by the United States in 1961.[2]

In substance, the various complaining parties charge that petitioners, individually and in concert, committed fraud on the United States Patent Office in connection with the prosecution of the Conover patent owned by Pfizer on tetracycline, a broad spectrum antibiotic, and, in addition, that they thereafter conspired to exclude competition and fix antibiotic drug prices in violation of the Sherman Act.

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[1] In the matter of American Cyanamid Company, et al., Docket No. 7211 (complaint filed July 28, 1958), *order vacated and remanded*, 363 F.2d 757 (6th Cir. 1966), *order after remand aff'd*, sub nom., *Chas. Pfizer & Co., Inc.* v. *Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

[2] *United States* v. *Chas. Pfizer & Co., Inc.*, 61 Cr. 772 (Indictment returned August 17, 1961), *rev'd for new trial*, 426 F.2d 32 (2d Cir.), *prior en banc hearing order vacated, opinion of panel modified, and petition for rehearing denied*, 437 F.2d 957 (1970), *new trial determination aff'd by equally divided court*, . . . U.S. . . . (No. 70-72, Jan. 24, 1972).

The pricing policies of these drug companies were the subject of Federal Trade Commission investigations between 1951 and 1958 and an extensive investigation by a Senate subcommittee, which subsequently reported its findings to the full committee.[3]

Following the Commission proceedings, several civil antitrust actions were brought against some or all of the petitioners. After the jury verdict in the criminal case, more than one hundred similar actions were commenced. A large number of these cases were venued in the Southern District of New York, some having been commenced in that district and others having been transferred to that district for coordinated pretrial proceedings before the Hon. Inzer B. Wyatt. A majority of these cases were settled with the approval of Judge Wyatt. His opinion approving the settlement is reported as *State of West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971).

Following the settlement of the bulk of the cases, the Judicial Panel on Multi-district Litigation assigned the nonsettling cases to Judge Miles Lord, who had been specially assigned to the Southern District of New York.[4] Subsequently, over defendants' objection, Judge Lord transferred the majority of those cases to the District of Minnesota for trial, pursuant to 28 U.S.C. §1404(a). This action was approved by the Second Circuit in *Pfizer, Inc. v. The Hon. Miles W. Lord*, 449 F.2d 122 (2d Cir. 1971).

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[3] S. Rep. No. 488, 87th Cong., 1st Sess. 1961.

[4] On making the assignment, the Judicial Panel stated:

> We are certain that Judge Miles Lord will direct discovery in such a way that pretrial in all *non-settling cases* will proceed expeditiously and efficiently and without delay or duplication. *In re Antibiotic Drugs*, 320 F. Supp. 586, 590-91 (1970).

Judge Wyatt's opinion outlines the historical background of the prior civil, criminal, and administrative proceedings. We relate some of this history here as background. Cyanamid, in late 1948, produced one of the first broad spectrum antibiotics, chlortetracycline, which it subsequently marketed under the trade name Aureomycin. Cyanamid received a patent (Duggar) on chlortetracycline in 1949 and an improvement patent (Niedercorn) in 1950.

In late 1952, Pfizer claimed discovery of tetracycline, an antibiotic said to be highly superior in some respects to other antibiotics then on the market, through dechlorination of chlortetracycline. Pfizer applied for a patent on tetracycline in late 1952; Cyanamid applied for a patent on tetracycline in early 1953. Because of the conflicting applications, the Patent Office declared an "interference." In two meetings held in November 1953, Pfizer and Cyanamid entered into an agreement by which Cyanamid would license Pfizer under the Duggar and Niedercorn patents. In addition, it was agreed that proofs of priority on tetracycline would be exchanged and that the party found not to have priority would concede priority to the other. The party receiving the patent on tetracycline would then license the other. Thereafter, on the exchange of evidence as to priority, Cyanamid conceded in February of 1954 that Pfizer's patent (Conover) represented the first discovery of tetracycline. The patent was issued to Pfizer in January 1955.

Commencing in 1954, Bristol began producing tetracycline and selling it in bulk to Squibb and Upjohn. Bristol, Squibb, and Upjohn sued Pfizer for a declaratory judgment invalidating the patent. The parties reached a settlement whereby licenses under the patent were granted by Pfizer to Bristol, Squibb, and Upjohn.

In 1958 the Federal Trade Commission, after extensive investigation, issued a complaint against the five drug companies, alleging that Pfizer had secured its patent on tetracycline by conspiracy and fraud, and that all of the drug companies were guilty of withholding material information from the Patent Office and were guilty of monopolistic practices in the production and sale of broad spectrum antibiotic drugs. This aspect of the litigation ended in 1969 without a conclusive finding of guilt, except as to misconduct of Pfizer and Cyanamid before the Patent Office. See discussion in *State of West Virginia* v. *Chas. Pfizer & Co., supra*, 314 F. Supp. at 715-18.

After reviewing the prior proceedings, Judge Wyatt observed:

> After two exhaustive and lengthy investigations by two agencies of the government, there are no findings of any misconduct by any of the defendants which would show, even prima facie, a violation of the antitrust laws. The only findings of misconduct are those by the Commission that Pfizer and Cyanamid each in substance committed a fraud on the Patent Office; the Commission, however, found that no conspiracy in this respect between Pfizer and Cyanamid had been proved before the Patent Office, our Court of Appeals has said that this is relevant to the issue of violation of the antitrust laws 'only insofar as the acts of Pfizer and Cyanamid supported an inference that at the November 1953 meetings they had entered into agreements to fix prices or to exclude others'.
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> • • •
>
> Thus, in the Commission proceedings there are no findings of any misconduct by three of the defen-

> dants—Bristol, Squibb and Upjohn. As to the other two defendants, Pfizer and Cyanamid, the only finding of misconduct has to do with patent prosecutions in the Patent Office. Aside from serious questions of law about the effect of this misconduct, it would not itself constitute any violation of the antitrust laws; at best, it might arguably be some evidence of an attempt to monopolize. [314 F. Supp. at 741-42]

Judge Wyatt noted that the reversal of the criminal antitrust convictions against Cyanamid, Pfizer, and Bristol "leaves the criminal proceeding without substantial effect at this point." *Id.* at 742.[5]

The pending actions reiterate the charges made in the prior administrative and judicial proceedings that the defendants conspired to restrain interstate commerce in the manufacture, sale, and distribution of tetracycline and other broad spectrum antibiotic products and also conspired to monopolize the manufacture, sale, and distribution of those products.

II.

The Present Petition

In the instant proceedings, petitioners assert that Judge Lord, through his actions, statements, and conduct, has demonstrated personal bias and prejudice by the following:

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[5] The Supreme Court's recent affirmance of the Second Circuit's reversal of the criminal conviction, *United States* v. *Chas. Pfizer & Co., Inc.*, . . . U.S. . . . (No. 70-72, Jan. 24, 1972), has preserved the aptness of Judge Wyatt's comment upon the lack of finality of the criminal proceeding.

(1) taking aggressive action to attempt to dissuade the United States Department of Justice from settling its civil action against the defendants in an effort to assist the other plaintiffs;

(2) suggesting that the United States Government, if it were to settle its civil action, would be permitting the defendants to "buy a monopoly";

(3) declaring that: "We may have another proceeding, or, at least some moves" against defendants to vindicate the integrity of the United States Patent Office and courts for fraud on those tribunals;

(4) urging the Department of Justice to investigate the Patent Office, which he characterized as "the sickest institution that our Government has ever invented" and "the weakest link in the competitive system in America";

(5) refusing, without a hearing, to consider a settlement of the treble damage class actions at a dollar amount previously approved in these cases by another district court and the Court of Appeals for the Second Circuit, which caused one damage plaintiff to withdraw its agreement to settle for that dollar amount;

(6) soliciting law suits against defendants by urging a private attorney to find some hospital patients to form a new class of plaintiffs;

(7) interrogating a deposition witness in an aggressive and angry manner, in an attempt to intimidate the witness and to influence his testimony along lines desired by plaintiffs, suggesting openly that the witness was evasive and lying, and threatening to levy a fine; and

(8) accusing counsel for one of the petitioners of instructing his client to "manufacture" or "doctor" evidence.

III.

Mandamus as a Remedy in Recusal Cases

We turn our consideration to a determination whether mandamus may be utilized by the petitioners at this stage of the proceedings to review Judge Lord's determination not to disqualify himself. Although the authorities are not uniform, a substantial body of law supports the proposition that mandamus to a United States Court of Appeals will lie when a district judge has rejected affidavits seeking his recusal as "legally insufficient." *Compare* (mandamus appropriate): *Will* v. *United States*, 389 U.S. 90 (1967); *Pfizer, Inc.* v. *Lord*, 449 F.2d 119 (2d Cir. 1971); *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1968); *Rosen* v. *Sugarman*, 357 F.2d 794 (2d Cir. 1966); *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir.), *cert. denied*, 365 U.S. 833 (1961); *United States* v. *Ritter*, 273 F.2d 30 (10th Cir. 1959); *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F.2d 545 (8th Cir. 1934); *with* (mandamus inappropriate): *Albert* v. *United States District Court*, 283 F.2d 61 (6th Cir. 1960), *cert. denied*, 365 U.S. 828 (1961); *Green* v. *Murphy*, 259 F.2d 591 (3d Cir. 1958); *Korer* v. *Hoffman*, 212 F.2d 211 (7th Cir. 1954). Judge Aldrich in *In re Union Leader Corp., supra*, noted:

> From the general standpoint of 'the interest of justice,' the right to be tried before an unbiased judge is also basic in our judicial system. Although there are differences of opinion, we agree . . . that public

> confidence in the courts may require that such a question be disposed of at the earliest opportunity . . . . This need not commit us to entertaining every rejected affidavit of prejudice; nor need we presently set forth the limits. It is to be borne in mind that mandamus is a discretionary writ. [292 F.2d at 384].

We think it noteworthy that the United States, as a respondent in these proceedings, suggests that mandamus is an appropriate remedy "given the complexity, number and probable duration of the cases involved"[6] and that "rather than leave such a serious charge unresolved throughout this lengthy litigation . . . the writ may properly be used here to review Judge Lord's denial of petitioner[s'] motion."

Accordingly, we believe that mandamus is an appropriate vehicle to review Judge Lord's refusal to recuse himself.

IV.

The Standard for Recusal

Before turning to detailed examination of the claims made by the petitioners, we review the legal principles which govern the determination of this case. The applicable substantive law is contained in 28 U.S.C. §144, which reads:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has

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[6] Judge Lord himself has characterized this case as "practically the biggest single assignment ever taken on by a judge anywhere in the history of jurisprudence of any kind."

a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

The Supreme Court, in *Berger* v. *United States*, 255 U.S. 22 (1921), construed a predecessor statute to mean that, although the challenged judge may not pass upon the truth of the facts alleged in the affidavit, he may decide whether the affidavit meets the procedural requirements of the statute and whether the facts alleged give fair support to the charge of bias and prejudice. By retaining the basic provisions of this earlier statute in the present §144, Congress apparently acquiesced in the procedure whereby a challenged judge may initially pass upon the legal sufficiency of the affidavit. *See*, Note, *Disqualification of Judges*, 79 Harv. L. Rev. 1435, 1438-39 (1966); Schwartz, *Disqualification for Bias in the Federal District Courts*, 11 U. Pitt. L. Rev. 415, 423 (1950). Petitioners have raised no question concerning the procedure followed by Judge Lord in passing upon the legal sufficiency of the affidavit.

The statutory concept of "personal bias or prejudice" was explained by the Supreme Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966).

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. [384 U.S. at 583]

In deciding whether petitioners' affidavits demonstrate this personal bias or prejudice, we accept the truth of the facts recited therein. We determine the validity of petitioners' conclusion of bias by examining the cited facts against the record presented to us.

V.

Early Incidents

The claim of bias and prejudice against Judge Lord appears to rest primarily on incidents which occurred in late August and early September 1971, although petitioners refer to Judge Lord's conduct and statements on earlier occasions as reflecting personal bias and prejudice. These early incidents provide a background against which the later remarks and comments of Judge Lord can be evaluated. We examine Judge Lord's comments chronologically but focus on the later comments.

The joint affidavit, in part, states:

> We have set forth in this joint affidavit specific incidents which we believe manifest Judge Lord's bias and prejudice. In substance these incidents show that Judge Lord has improperly assumed the role of prosecutor and advocate against defendants and has increasingly become more aggressive and open in this role....

Each affiant submits his affidavit with extreme personal reluctance. We do not assert that Judge Lord's prejudice is necessarily a deliberate or a conscious one....

While from the beginning there were indications and hints of Judge Lord's personal prejudice against and hostility toward defendants, none of these defendants believed that it was proper to take the serious step of making an application to recuse on these incidents alone. Defendants hoped that Judge Lord's appearance of bias and his prosecutorial attitude were illusory....

The extent of Judge Lord's prejudice and bias recently became clear as plaintiffs began taking depositions . . . of Harvey W. Edelblute, a patent attorney formerly employed by American Cyanamid Company, who, during the 1948-55 period, prosecuted Cyanamid's Aureomycin and tetracycline patent applications and was a participant in events leading to the patent aspects of this litigation....

(*a*)

At the request of the respondents, Judge Lord attended the first six days of Mr. Edelblute's deposition. Although there is some evidence that petitioners would have preferred that Judge Lord not be present, we feel that his presence is not critical.[7]

Petitioners claim Judge Lord manifested a biased state of mind while attending this deposition. We have reviewed this contention against a transcript of over one thousand pages in length and tape recordings of a portion of the

[7] 28 U.S.C. §1407(b) specifically contemplates the appointment of judges to preside at depositions in multi-district litigations.

deposition. We conclude from reading the transcript and listening to the tapes that much of the difficulty was caused by the compound questions asked by the attorney for the United States who interrogated Edelblute. Additionally, we note that Edelblute did not always respond directly to the questions asked, even when they were asked in a clear-cut manner.

The petitioners' affidavit cites several comments made during the deposition as proof of Judge Lord's bias:

> The Court: I will tell you one thing: At some point this witness is going to get pinned down and answer direct questions. He is a lawyer. He is a witness. He is under oath. My observation here, which I don't propose to incorporate into anything that goes before the jury, that he is acting in a very devious manner.

Later the judge threatened the witness:

> The Court: Now, that's not an answer to the question, and you are going to have to straighten out and fly right or the Court is going to impose a little fine on you.
>
> Mr. S. Murphy [Counsel for Cyanamid]: Well, Your Honor, I am going to except to that.
>
> The Court: You may except to it, and you may appeal from it. If he doesn't start answering questions, he is going to start getting fines for it.

We note that a later statement reflects an apparent change in Judge Lord's attitude toward the witness:

> The Court: You don't have to worry about the case if the man is answering questions directly. He has done very much better since we had our chat.

Although we consider some of the cited comments to be inappropriate, perhaps even unfair to the witness, we cannot say that they demonstrate any particular personal prejudice against petitioners.

Petitioners additionally allege that Judge Lord questioned Edelblute in an "inquisitorial" manner. The comments below demonstrate that the witness, who was a trained lawyer, found no objection to Judge Lord's occasional questions.

> The Court: All right. Now, I am sorry to interrupt, but sometimes a person will respond a little more directly to the Judge than to a lawyer and I am rather pleased with his answers at this point. Go ahead.
>
> The Witness: If I may say so, sir, your questions are a hell of a lot clearer than those being asked by Mr. Owens [Counsel for respondent United States].

This court has approved of a presiding judge questioning a witness in order to clarify facts and issues:

> The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the

witnesses. *Fidelity & Deposit Co. of Maryland* v. *Bates*, 76 F.2d 160, 170 (8th Cir. 1935).

We see no reason why such power need be restricted to the actual trial. We think that a trial judge may comment and inquire during the course of pretrial proceedings so long as he does so in a nonprejudicial manner.

After reviewing the transcript and tapes of the Edelblute deposition, we are not impressed with the petitioners' claims that Judge Lord demonstrated personal bias and prejudice through his comments at the deposition, or by his interrogation, of Edelblute. To the extent Judge Lord's remarks can be construed to impugn Edelblute's veracity, they would seem to be prematurely made during pretrial proceedings and therefore unfair, but the remarks fail to reflect any personal bias or prejudice. This type of prejudgment, although unfortunate, cannot serve as a basis for recusing Judge Lord.

(*b*)

Petitioners also charge that Judge Lord arbitrarily rejected a proposal from the State of Hawaii that it settle its action under the so-called "Alabama plan," a formula which had been judicially approved by Judge Wyatt.* Petitioners assert that the State of Hawaii withdrew a settlement proposal made to petitioners after Judge Lord informed their attorney by telephone that the court would refuse to approve this settlement or any settlement at the "Alabama plan" level. In a letter to all parties dated

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*The Alabama plan provided for allocation and apportionment among all plaintiffs of the sum offered by petitioners to settle all claims during the time Judge Wyatt supervised this consolidated litigation. The plan is explained at 314 F. Supp. 726-30.

May 14, 1971, Judge Lord confirmed this telephone conversation and related that it would be "awkward" for him to approve the settlement on the basis of the meager information then known to him. The letter also stated that the adoption of Judge Wyatt's settlement plan would involve "an evaluation of plaintiffs' prospects" which the court was not prepared to make at that time.

Petitioners construe Judge Lord's comments as an unwarranted brushoff of a settlement proposal, reflecting bias. We note, however, that Judge Lord stated in the letter that his rejection of the proposed settlement would be "without prejudice to renewing the request at a later time." In the light of the meager information available on this issue, petitioners cannot prevail. We view with deep concern, however, any conduct or comments by the trial court which may hamper a fair settlement of any of the suits. We discuss the matter more fully in part VI of this opinion.

(c)

Petitioners also charge Judge Lord with soliciting lawsuits against them. The joint affidavit relates:

> At the pretrial conference of March 6th, while recognizing that it 'isn't the kind of a thing to spread on the record' he [Judge Lord] "urged," "invited" and "drafted" a private attorney to go out and find some hospital patients to form a class which none of the litigating plaintiffs had yet sought to represent.

Respondents dispute the accuracy of petitioners' recollection of Judge Lord's statements. Furthermore, respondents point out that Judge Lord was concerned with the

adequate representation of hospital patients as a consumer class. After consideration of all aspects of the claims of hospital patients, Judge Lord directed that they be dismissed. We have considered this comment and other similar comments referred to in petitioners' affidavit. In the light of the record, we reject the contention that such remarks, individually or collectively, manifest personal bias against petitioners.

VI.

The Proceedings of September 8, 1971

With this background, we now proceed to a consideration of a conference between court and counsel on September 8, 1971, which Judge Lord called in order to consider the "court's role" relating to the "public interest aspects" of a proposed settlement between petitioners and the United States. We deem Judge Lord's comments at this conference critical to our evaluation of the sufficiency of petitioners' charges.

Petitioners' affidavit asserts that during this conference Judge Lord displayed bias and prejudice (1) in aggressively attempting to dissuade the United States Department of Justice from consummating any settlement, thereby indicating an intent to assist the plaintiffs in the prosecution of their lawsuits; (2) in improperly implying that Edelblute had given false testimony at the discovery deposition; (3) in issuing, sua sponte, an order to show cause why certain competitor cases not then venued in Minnesota should not be transferred to that district for trial; and (4) in expressing great distrust for the United States Patent Office, thus demonstrating that he lacked the

impartiality to determine fairly whether or not petitioners had committed fraud upon the Patent Office in obtaining the Pfizer patent on tetracycline.

In evaluating these charges, we have examined the transcript of this conference. Portions of the Edelblute deposition also bear upon these issues. During the course of that deposition, Judge Lord advised the parties that he had personally called Assistant Attorney-General McLaren, in charge of antitrust matters for the Department of Justice, and had indicated special interest in the possible settlement of the government's action in Count I of its complaint which seeks cancellation of the Pfizer patent on tetracycline.[9]

In response to this request, Lewis Bernstein, Chief of the Special Litigation Section of the Antitrust Division, appeared before Judge Lord on September 8, 1971, and orally advised the court and interested counsel that the United States and the petitioners had reached a tentative agreement[10] to settle Counts II and III of the government's complaint, and that to consummate the settlement, the government contemplated dismissing Count I, which seeks cancellation of Pfizer's tetracycline patent for fraud. According to Mr. Bernstein, the proposed settlement provided that this patent would be dedicated to the public, rather than cancelled as fraudulently procured. Mr. Bern-

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[9] Judge Lord said:

> I believe I made a record of the fact that I previously had talked to Mr. McClaren on the phone and suggested to him that Count No. I was so fraught with public interest and that the very integrity of the court system seemed at stake assuming prima facie that the allegations are established and the courts of this nation have been imposed upon, and for that reason I wanted to confer with him before he made any settlement . . . .

[10] The tentative agreement provided that Counts II and III would be settled for approximately fourteen million dollars.

stein also stated that, since the other plaintiffs had relied upon the Department of Justice in developing the patent aspects of the litigation, the government would make available to plaintiffs all information it had gathered on that issue.

In response, Judge Lord expressed concern whether the public interest would be served by the dismissal of Count I and also expressed his displeasure at having his "game plan" upset by the settlement:

> I don't believe in making speeches for the record that do not truly reflect my feelings on the subject. I deliberately combined the states cases with the Federal case on the theory that it might save us a multiplicity of trials. I was fully aware of the fact that Count 1 in equity was to be tried by the Court and we could try it with reasonable dispatch. For that very reason I sat in on Mr. Edelblute's, or a great portion of Mr. Edelblute's deposition testimony so that I could get some gauge of credibility, to kind of place the case and get the feel of it and see what it was that Mr. Owens was driving at.
>
> All of these things have gone by the boards if you settle this case. You not only in effect give the plaintiffs an added burden of trying your case, but you upset the "game plan" which the Court, after a good deal of consideration and deliberation set as a means of disposing not only of the cases with which I was combined, but all of these cases in one proceeding.

Judge Lord added:

> This, as you know, Mr. Bernstein, has got to be practically the biggest single assignment ever taken

> on by a judge anywhere in the history of jurisprudence of any kind. So, if I have been guilty of trying to figure out a way where I could get at the key issues and dispose of them, I plead guilty to that. It stings me just a little bit when the rug is pulled out from under me and I now face considerable more work to get rid of this mountainous litigation. I am just human enough so that I feel very badly about my friends who are defending this case when I have to lean this way and indicate to them that I would find a shorter way of resolving it that might not work to their advantage because I know they would want a jury to do it rather than have me do it. But I would do what the law provides in that regard.

Petitioners also take umbrage at Judge Lord's comments upon Edelblute's testimony at the September 8th proceedings. Judge Lord stated:

> . . . . However, I am not unmindful of the fact that fraud on the Patent Office is here alleged and that for about seven days Mr. Harvey Edelblute sat on the witness stand and with all of the power at his disposal as a consultant and employee of the defendant corporation Cyanamid, he alleged that nothing which he did or said constituted fraud despite the holding of the FTC and the grand jury.

Finally, during the exchange with Mr. Bernstein, Judge Lord turned his attention to a possible relationship between the United States Attorney General and the Patent Office, suggesting:

> I think you ought to tell your Attorney General, if he wants to look at something, he ought to look at

> that Patent Office. That has got to be the sickest institution that our Government has ever invented. It is just, as far as I can see, an attritional war between the patent applicant and the patent examiners, who apparently get paid on the piece work for how many patents they could put out. And you can examine for months some poor fellows that are out doing business and finally arrive at a price structure, and you might get an antitrust suit. But if you want to look, go back and look in your Patent Office and see what is happening to the Patent Office. I say that for the record and for posterity. That has got to be the weakest link in the competitive system in America.

The record manifests Judge Lord's obvious perturbation over the contemplated settlement. His words were strong. Yet his ire seems directed not at petitioners but at the government, which, according to Judge Lord, might be selling out the public interest.

We think it clear that Judge Lord misconceived his role vis-a-vis the settlement. Petitioners assert that a district judge lacks the power to approve or disapprove any proposed settlement between the government and the defendants. *See Confiscation Cases*, 7 Wall. 454 (1868); *Ex Parte American Steel Barrel Co.*, 230 U.S. 35 (1913). We have been shown no authority to the contrary.

We note, however, that the court's remarks concerning the public interest in the settlement of Count I rested upon Judge Lord's assumption, frequently stated in the record, that the government prove the truth of its allegations. Moreover, Judge Lord's concern over the upsetting of his "game plan" in managing the litigation may have

been better left unsaid, but that statement does not manifest any personal bias and prejudice toward petitioners.

We find Judge Lord's remarks suggesting that the Attorney General ought to look at the Patent Office, "the sickest institution . . . ever invented," to be totally injudicious. These words should not have been spoken, and we wholly disapprove of them. Nevertheless, even if we accept petitioners' arguments that these comments disclose a prejudicial attitude concerning the relationship between petitioners and the Patent Office, these observations may have come as a result of Judge Lord's exposure to the prior proceedings and the facts disclosed during the pretrial proceedings. Thus, although Judge Lord's comments were gratuitous and wholly extraneous to the question then before him, we cannot say that they reflect an "extrajudicial bias" as is required for recusal under *Grinnell, supra.*

Because Judge Lord's conduct and comments may have discouraged settlements between the parties, we add a word of admonition to the litigants and to the District Judge. This complex and difficult litigation places unusual burdens upon an already overburdened federal court system and upon the very busy District Court for the District of Minnesota. Respondents have described the task of Judge Wyatt, who preceded Judge Lord in the handling of these cases, as "awesome." The Second Circuit has referred to the "sizeable judicial resources" already consumed by this litigation. *Pfizer Inc. v. Lord, supra,* 449 F.2d 119, 121.

This court is well aware that Judge Lord has expended great energy over many months in the management of these cases and in his effort to complete pretrial discovery. Yet, after all of this, months of trial may still lie ahead

and years may elapse before all the threads of this litigation are unraveled. The incidents giving rise to these lawsuits occurred almost twenty years ago. We think there is much to be said in the public interest for the parties arriving at an amicable settlement without interference by the court. We think those parties to this litigation who may seek fair settlement deserve the approbation of the courts.

In reviewing the explanation given by Mr. Bernstein relating to the proposed settlement between the United States and petitioners, we particularly note that the proposed settlement requires the dedication of the patent to the public, and that, notwithstanding any settlement, government attorneys will make available to the other plaintiffs pertinent data relative to the claim of patent fraud. While other plaintiffs may prefer that the government continue its participation in this lawsuit, they may not demand it. We think it appropriate to state our view that we believe fair settlement of any of the plaintiffs' claims, including the claims of the United States, will likely promote the overall public interest. Conversely, any action of Judge Lord which discourages fair settlements will contravene the public interest.

In holding Judge Lord's actions to this point concerning the proposed settlements to be nonprejudicial, we are mindful that Judge Lord needed adequate time to familiarize himself with the case before encouraging the parties actively to seek settlement. We trust that he possesses the requisite knowledge and information at this time to pass promptly upon settlement proposals that may be submitted to him for approval. The policy of the law encourages compromise to avoid the uncertainties of the

outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto. In light of the record presented to us, we think it appropriate to direct Judge Lord not to impede any fair settlement of any of the cases presently before him. This direction applies both to the government's proposed settlement and to any settlement reached by petitioners and any of the other plaintiffs.

We think it advisable for the benefit of the District Court and counsel to repeat here Judge Wyatt's analysis of factors to be considered in evaluating any settlement, an analysis approved by the Second Circuit:

> Whether to approve the compromise involves an exercise of discretion. The Court is responsible for the protection of the many class members whose interests are involved but who do not appear in the action. Approval should be given if the settlement offered is fair, reasonable, and adequate. These terms are general and cannot be measured scientifically.
>
> The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement. This factor is sometimes referred to as the likelihood of success. The Supreme Court directs the judge to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation. . . . and all other facts relevant to a full and fair assessment of the wisdom of the proposed compromise". The Supreme Court then emphasizes: "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely

rewards of litigation." The quotations are from Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-425, 88 S. Ct. 1157, 20 L.Ed.2d 1 (1968). [440 F.2d at 1085 quoting 314 F. Supp. 740-41]

VII.

Conclusions

We have reviewed Judge Lord's comments and his actions and have evaluated them against circumstances disclosed in cases in which appellate courts have forced a judge to recuse himself or reversed a judgment because of demonstrated bias. In *Berger* v. *United States*, 255 U.S. 22 (1921), the affidavit was held to be sufficient because of the openly espoused anti-German animus of the trial judge. *Cf. Tumey* v. *Ohio*, 273 U.S. 510 (1927). In *United States* v. *Hatahley*, 257 F.2d 920 (10th Cir.), *cert. denied*, 358 U.S. 899 (1958), the trial judge was openly biased in favor of the plaintiff Indians and "[a] public appeal in behalf of the plaintiffs was made for funds and supplies to be cleared through the Judge's chambers." *Id.* at 926. *See also, e.g., Peacock Records, Inc.* v. *Checker Records, Inc.* 430 F.2d 85 (7th Cir. 1970); *Knapp* v. *Kinsey*, 232 F.2d 458 (6th Cir. 1956); *Whitaker* v. *McLean*, 118 F.2d 596 (D.C. Cir. 1941). The facts contained in petitioners' affidavit fall short of showing the bias and prejudice needed to recuse.

We recognize that advocates construe statements of a trial judge in a somewhat partisan light and thus magnify the impact of any comment of the court, whether it be

favorable or critical.[11] A trial judge, unless he carefully weights his pretrial comments, may very well leave the impression that he has improperly prejudged the case, a situation which seems to have occurred here. It is important that the litigant not only actually receive justice, but that he believe that he has received justice. A judge, like Caesar's wife, should be above suspicion.

Finally, we must consider respondents' motion for damages. We initially observe that this is a close case. We are convinced of petitioners' sincerity and good faith in filing their affidavits even though we have ruled adversely to their contentions. Clearly, some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality. Accordingly, we deny respondents' motion for damages and costs.

Although we deny the petition for recusal, we add a caveat. This record adversely reflects upon Judge Lord's conduct during the pretrial proceedings. Reluctantly, we have pointed out his shortcomings in this case. We demand of Judge Lord, as we do of every trial judge in this circuit, a high standard of judicial performance with particular emphasis upon conducting litigation with scrupulous fairness and impartiality. We commend to Judge Lord the Socratic definition of the four qualities required of every judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.

These cases will continue under Judge Lord's aegis. We expect him to provide an impartial forum in compliance

---

[11] Petitioners' assertion that Judge Lord has unjustifiably attacked the integrity of defense counsel falls into this category. The remark attributed to Judge Lord that "it would not bother me to find that lawyers were part of the conspiracy" does not directly cast any aspersions upon defense counsels' integrity, but we recognize that this cryptic remark might be so interpreted.

with his judicial obligation. If petitioners' fears that they will not be afforded a fair trial should prove justified, they are not left without an appropriate remedy. *See, e.g., Rosen* v. *Sugarman, supra,* 357 F.2d at 798; *In re Union Leader Corp., supra,* 292 F.2d at 389.

Petition denied. The parties shall bear their respective costs.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	4-71 Civ. 435 and the following actions:

4-68 Civ.409 4-71 Civ.403 4-71 Civ.420
4-68 Civ.411 4-71 Civ.404 4-71 Civ.421
4-69 Civ.458 4-71 Civ.405 4-71 Civ.422
4-69 Civ. 75 4-71 Civ.406 4-71 Civ.423
4-68 Civ.410 4-71 Civ.407 4-71 Civ.424
4-71 Civ.6 4-71 Civ.408 4-71 Civ.425
4-71 Civ.392 4-71 Civ.409 4-71 Civ.426
4-71 Civ.393 4-71 Civ.410 4-71 Civ.427
4-71 Civ.394 4-71 Civ.411 4-71 Civ.428
4-71 Civ.395 4-71 Civ.412 4-71 Civ.429
4-71 Civ.396 4-71 Civ.413 4-71 Civ.430
4-71 Civ.397 4-71 Civ.414 4-71 Civ.431
4-71 Civ.398 4-71 Civ.415 4-71 Civ.432
4-71 Civ.399 4-71 Civ.416 4-71 Civ.433
4-71 Civ.400 4-71 Civ.417 4-71 Civ.434
4-71 Civ.401 4-71 Civ.418
4-71 Civ.402 4-71 Civ.419

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	M-19-93A and the following actions:

69 Civ. 1000
70 Civ. 180
69 Civ. 4091
70 Civ. 1605
69 Civ. 1315
68 Civ. 4235
70 Civ. 877

DEFENDANTS' JOINT MOTION AND APPLICATION

Defendants Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Beech-Nut, Inc. and The Upjohn Company hereby move and apply that the Honorable Miles W. Lord proceed no further and recuse himself as judge in all of these actions on the ground that he bears such bias and prejudice

against defendants as will substantially prejudice defendants' rights to a fair trial. This joint application and motion for disqualification is pursuant to and based upon the Fifth Amendment to the Constitution of the United States and 28 U.S.C. Sec. 144, the record of all prior proceedings had in these actions, the annexed affidavits of Edmund T. Pratt, Jr., Executive Vice President of Pfizer Inc., Harold B. Gross, Secretary and General Counsel of American Cyanamid Company, Frank A. Sprole, Vice President and head of the Legal Division of Bristol-Myers Company, Ross Reid, Vice President and General Counsel of Squibb Beech-Nut, Inc., Gerard Thomas, Vice President, Secretary and General Counsel of The Upjohn Company, the annexed joint affidavit of counsel, and the defendants' Joint Memorandum submitted herewith.

Dated: September 17, 1971.

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	M-19-93A ALL ACTIONS

JOINT AFFIDAVIT

JULIAN O. VON KALINOWSKI, ROBERT E. COOPER, JOHN W. THOMAS, PETER DORSEY, SAMUEL W. MURPHY, JR., MERRELL E. CLARK, JR., ROBERTS B. OWEN, ALLEN F. MAULSBY, JOHN D. FRENCH, GORDON D. BUSDICKER and LAWRENCE W. HAYES being duly sworn, each individually and jointly depose and say:

1. Each of affiants is an attorney who has represented one of the defendants herein (Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Beech-Nut, Inc., and The Upjohn Company) in the proceedings had in these actions before the Honorable Miles W. Lord. Each affiant has personal knowledge of some of the facts stated herein and information and belief of the remainder thereof, but each is familiar with the events which have transpired in these proceedings and the circumstances in which they have taken place, including the demeanor and attitudes as well as the words of Judge Lord. Each submits this

affidavit in support of defendants' joint application and motion requesting that the Honorable Miles W. Lord recuse himself from proceeding further as Judge in these actions.

2. This complex litigation now involves 56 of the more than 150 antitrust treble damage actions which were brought by a number of different categories of plaintiffs including states, wholesalers and retailers, insurance companies, private hospitals, agricultural purchasers and competitors, each alleging that defendants conspired in violation of the Sherman Act to exclude competition and fix prices in the broad spectrum antibiotic drug market. Many of these cases were brought as class actions and have been permitted to proceed on that basis. In addition, the United States has sued for single damages arising from its purchases of defendants' products and for cancellation of Pfizer's Conover patent covering product and process claims on the broad spectrum antibiotic drug tetracycline. Until recently, all the cases, originally filed in judicial districts throughout the country, were pending in the Southern District of New York for pretrial proceedings pursuant to 28 U.S.C. § 1407. A majority of these cases were settled, including suits of 43 of 50 states, private hospitals, Blue Cross, wholesalers and retailers, pursuant to offers totaling $132,500,000 which had been made by defendants. These settlements were approved by Judge Inzer B. Wyatt (who had presided over pretrial proceedings in all the cases until Judge Lord's assignment by the Judicial Panel on Multidistrict Litigation to the "litigating cases" in December of 1970) and also by the Second Circuit Court of Appeals. Most of the remaining cases have been transferred by Judge Lord to the District of Minnesota for trial pursuant to 28 U.S.C. § 1404(a) or, in the few instances where cases were originally filed there, are being remanded to that District.

3. Each of the affiants has concluded on the basis of his personal experience in these proceedings, and on information and belief, that Judge Lord possesses, and has possessed from the outset, such prejudice against defendants that it will be impossible for him to preside over further pretrial proceedings or at trial of these actions in such fair, equitable and judicious manner as the law and fundamental concepts of due process require. Moreover, each of the affiants has similarly concluded that Judge Lord possesses such prejudice against defendants that it would be impossible for him to perform fairly such judicial functions as might ever be required in these actions under Rule 23(e) in the event of settlement:

4. We have set forth in this joint affidavit specific incidents which we believe manifest Judge Lord's bias and prejudice. In substance, these incidents show that Judge Lord has improperly assumed the role of a prosecutor and advocate against defendants and has increasingly become more aggressive and open in this role. In addition, our individual observations of Judge Lord's demeanor during these proceedings form an important part of our conclusions about his prejudice, and they have contributed to our conviction that it is impossible for Judge Lord fairly to preside either over further pretrial proceedings -- including any hearing pursuant to F.R. Civ. P. 23(e) -- or at trial.

5. Each affiant submits this affidavit with extreme personal reluctance. We do not assert that Judge Lord's prejudice is necessarily a deliberate or conscious one. All of us have some deep-seated feelings of which we are unaware, and we respond to their powerful forces without knowing it. But defendants' rights to a fair trial will be imperiled by any such prejudice.

6. These actions are of great importance to defendants. Serious and far reaching charges of wrongdoing have been made, and the claims for money damages involve extremely large sums. Because many of the actions are being maintained as class actions -- some on behalf of untold millions of individual consumers -- trial of these actions will adjudicate the rights between many millions of individuals, business entities, and governmental institutions and the defendants. Whatever litigation goes forward will be extremely lengthy, complex, time-consuming and costly for all concerned. Accordingly, it is extremely important that defendants be assured of a fair trial before a fair and impartial tribunal.

7. Defendants are compelled to make this application now; they could not have fairly done so earlier. While from the beginning there were indications and hints of Judge Lord's personal prejudice against and hostility toward defendants, none of the defendants believed that it was proper to take the serious step of making an application to recuse based on those incidents alone. Defendants hoped that Judge Lord's appearance of bias and his prosecutorial attitude were illusory. Events which have occurred in recent weeks have made Judge Lord's attitudes and sentiments in this litigation clear, and have necessitated recourse to this application.

8. The extent of Judge Lord's prejudice and bias recently became clear as plaintiffs began taking depositions. On August 18, 1971 the deposition commenced of Harvey W. Haelblute, a patent attorney formerly employed by American Cyanamid Company who, during the 1948-55 period, had prosecuted Cyanamid's Aureomycin and tetracycline patent applications and was a participant in events relating to the patent aspects of this

litigation. Plaintiffs insisted that Edelblute's deposition be held before Judge Lord. Through the first six days of the deposition, despite defendants' objection, Judge Lord attended each session and exhibited a strong and, we believe, extraordinary personal interest in the testimony. Mr. Edelblute, who left Cyanamid's employ in 1958 and is now retired and more than sixty years of age was called upon to testify to the details of complex matters which had occurred fifteen to twenty-five years ago. He was severely handled by Judge Lord. On numerous occasions, Judge Lord interrogated the witness, often in an aggressive and angry manner. He suggested openly that the witness was lying, repeatedly criticized Mr. Edelblute's manner of responding, and on one occasion threatened to levy a fine. Furthermore, Judge Lord suggested areas of inquiry and leads to follow for the benefit of plaintiffs' counsel, a trial attorney from the Department of Justice.

Although the transcript does not reveal either Judge Lord's fervor or tone of voice in his interrogation of this pretrial witness, the transcript does establish the utilization of high office to serve as an advocate for plaintiffs and to intimidate Mr. Edelblute in an attempt to influence his testimony:

> "THE COURT: I will tell you one thing: At some point this witness is going to get pinned down and answer direct questions. He is a lawyer. He is a witness. He is under oath. My observation here, which I don't propose to incorporate into anything that goes before the jury, that he is acting in a very devious manner. (Tr. Vol. II at 214)
>
> * * *
>
> "THE COURT: You see, my admonition to you was not fear. Three of four times, you have made what you call misstatements, and I have done nothing about it, but when you refuse to answer a direct question, and when you try and avoid the question or give an answer to a question that wasn't asked, you are going to hear from me here and now. If at a later time somebody comes up and proves you lied here, you will hear from me then. If you just give your best estimate and your best judgment on these

things, that is all that is required of you. You are not supposed to sign an oath in blood on everything. Do your best now. (Tr. Vol. II at 258-59)

* * *

"THE COURT: Well, I think he might be spoiling a good witness for the trial by going through this, but that is his business. I don't mean to criticize you, Mr. Owens.

"MR. OWENS [counsel for the United States]: I am sorry, I didn't hear it if it was criticism.

"THE COURT: I am just saying that much of this might be education to Mr. Edelblute, but that is the chance we take. (Tr. Vol. II at 270)

* * *

"THE COURT: Now, that's not an answer to the question, and you are going to have to straighten out and fly right or the Court is going to impose a little fine on you.

"MR. S. MURPHY [counsel for Cyanamid]: Well, Your Honor, I am going to except to that.

"THE COURT: You may except to it, and you may appeal from it. If he doesn't start answering questions, he is going to start getting fines for it.

"MR. S. MURPHY: May I have that question read back then?

"THE COURT: Yes. He understands it. You understand it, and I understand it.

"MR. S. MURPHY: No, Your Honor, I do not.

"THE COURT: All right, read the last four or five remarks back.

(The last few questions and answers were read by the reporter.)

"THE COURT: He knows that that is a wrong answer, and we all know it is a wrong answer.

"MR. S. MURPHY: I suggest, Your Honor, that it is not a wrong answer.

"THE COURT: It doesn't strike me as being right Ask it again. We will try again. (Tr. Vol. II at 253-54)

* * *

"THE COURT: I think that is the best answer you are going to get out of him as along as he keeps contradicting himself. So, why don't you just go

along. I submit that he has contradicted himself by telling us about a whole page of mutants that produced more.

"MR. S. MURPHY: I submit, Your Honor, he has not. Of course, the transcript will show what it shows. (Tr. Vol. I at 154)

* * *

"THE COURT: Now, I did cut you off, Mr. Owens. I really don't mean to cut you off, but it is obvious that he is going to come out a little different answer every time, so don't you have the meat of it now? (Tr. Vol II at 219)

* * *

"THE COURT: When you get into this area of co-production there are many, many documents which I have no way of knowing what the government or the plaintiffs might have seen. But you want to remember what the material that is available that shows what you really did see is available to the Court and will soon be available to the plaintiffs and you better judge your answers accordingly because I would hope that at this point we would get right down to business. And if there are some admissions you have to make you just have to make them.

If you don't make them and if the Court is satisfied you should have made them we will deal with that later. (Tr. Vol. IV at 161)

* * *

"THE COURT: On this particular one, my recollection is that he had considerable time to review it during the proceeding and I am very troubled by this witness' recalcitrance. When he is in the mood, he can go along and tell you what a document is. When he is out of the mood, you can't get anything out of it, and I am not sure it would help him to give him the documents in advance. I go somewhat by what is happening here.". (Tr. Vol. IV at 255)

Two examples of Judge Lord's interrogation of Mr. Edelblute show that the interrogation was conducted in a manner designed to cajole or intimidate the witness into testifying to the conclusion which Judge Lord and plaintiffs desired:

"THE COURT: Now, what was the reasonable basis?

"THE WITNESS: That these fermentation liquors are unstable and they will not -- unless special precautions are taken they will change their composition in very short order after the fermentation has been completed.

"THE COURT: Well, now, let me interrupt. Didn't your answer running from "Obviously, the fermentation liquors that have been produced" down to where you say "no tetracycline was found" -- wasn't that just one big broad assumption?

"THE WITNESS: Yes, I suppose that is correct.

"THE COURT: It really wasn't based on real genuine investigation and scientific knowledge, was it?

"THE WITNESS: No, except that I had seen a report, I am sure, in which they said no other antibiotic had been found in these particular liquors, which I don't know anything about -- probably even then --

"THE COURT: If you had had the shoe on the other foot and were trying to prove prior production of tetracycline, you wouldn't have answered this the same way, would you?

"THE WITNESS: Well, obviously not. (Tr. Vol. IV, p. 171)

* * *

"MR. DORSEY: But, at any rate, it seems to me that a question from the Court in the form of your question which was clearly a leading question --

"THE COURT: It was.

"MR. DORSEY: -- to ask him whether or not his conclusions weren't based some broad general assumption is much more calculated to lead to the answer which the Court wants, an affirmative answer than would a similar question from Counsel.

And I don't know quite what the objection should be, but I would like to note our objection to that question.

"THE COURT: That is something we can adjust later. But the Witness is so adversary and so overly cautious and so, as it were, obtrusive, such an obfuscator, I really lose patience waiting around for him to answer a direct question.

"MR. DORSEY: Well, that's obvious, I think.

But let me say this: that an answer to the -- I think what he was saying in answer to your question was the assumption was since no other antibiotic was found you could therefore assume that tetracycline, which was an antibiotic, wasn't found. That wasn't obvious in his answer and that you didn't give him a chance to make that.

"THE COURT: Mr. Dorsey, that might be. Since he didn't look and find and know about it -- he says he didn't -- whether or not he is telling the truth about that, of course, remains to be seen. But sometimes I get a little confused at whose documents I am looking at. But someplace in the documents that are evidences are probably quite contrary to that. If he looked he could have found. And the question then is: can you go to the patent [sic] office blindfolded and say "It is all black out there"? (Tr. Vol. IV, pp. 174-175)

* * *

"THE COURT: Let me ask a question. Mr. Watson said that you should submit one of your best strains and you should "by no means attempt to hoodwink anyone by placing on file a dead or weak culture or one that gives very low yields of aureomycin. The mold should of course be the one that is described by us in our patent application and which produces satisfactory yields of aureomycin."

"THE WITNESS: Right

"THE COURT: Mr. Malcolm says he is a bit weak on biology as related to microorganisms, which meant, did it not, that Mr. Malcolm didn't follow Mr. Watson's advice?

"THE WITNESS: Well, he, Dr. Malcolm, I think, was upset by the --

"THE COURT: Answer my question.

"THE WITNESS: Yes.

"MR. COOPER: Your Honor, I want to object to the question. That calls for, I think, Mr. Malcolm's state of mind. Or does it relate to some conversation?

"THE COURT: It relates to how he read this document.

And what did he answer? He didn't follow Mr. Watson's advice, did he?

"THE WITNESS: No." (Tr. Vol. I, 165)

At the September 8, 1971 pretrial hearing, Judge Lord made the following statement concerning his views of Mr. Edelblute's testimony:

> "THE COURT: However, I am not unmindful of the fact that fraud on the Patent Office is here alleged and that for about seven days Mr. Harvey Edelblute sat on the witness stand and with all of the power at his disposal as a consultant and employee of the defendant corporation Cyanamid, he alleged that nothing which he did or said constituted fraud despite the holding of the FTC and the grand jury.
>
> "I suppose I am going to stop talking very shortly now but I am deeply troubled by what I see." (Tr. at 61)

Judge Lord's expression of disappointment that Mr. Edelblute did not admit the commission of a fraud shows the extent to which he prejudged important issues in these cases.

9. Judge Lord has taken aggressive action to attempt to dissuade the United States Department of Justice from settling its civil action against the defendants, in an admitted effort to assist the other plaintiffs.

The defendants had been engaged in lengthy negotiations with the Department of Justice in an attempt to settle the United States action. Recently an understanding was reached as to the terms of a settlement which we understand the Assistant Attorney General of the United States, Richard W. McLaren, intends to recommend to the Attorney General of the United States. When Judge Lord became aware of the understanding he contacted Assistant Attorney General McLaren for the apparent purpose of dissuading the Department of Justice from proceeding with the settlement, although Judge Lord had no authority over the settlement, nor indeed was it before him in any form or fashion. Regarding that telephone conversation, Judge Lord subsequently (on August 25, 1971) stated on the record that:

> "I believe I made a record of the fact that I previously had talked to Mr. McLaren on the phone and had suggested to him that count number

> l was so fraught with public interest and that the very integrity of the Court system seemed at stake assuming prima facie that the allegations are established then the courts of this nation have been imposed upon, and for that reason I wanted to confer with him fore he made any settlement, and I actually at that time had considered the advisability of doing as Judge Davies did down in Little Rock when he got in trouble with his school problem, actually appointing the Federal attorneys to handle that aspect of it which had to do with the fraud committed on the court." (Edelblute Tr. Vol. V at 417)

On August 24 and August 25 during the Edelblute deposition, the Judge was openly critical of the prospective settlement of the United States case, expressing his view that the Government should not be allowed to drop its suit (Edelblute Tr. Vol. IV at 219-22, 247; Vol. V at 403, 417) and going so far as to suggest that he would not let the Government out (Edelblute Tr. Vol V at 447).

On those occasions; Judge Lord stated "I am interested in having the Government stay in these cases" because "Count I has public interest in it." (Edelblute Tr. Vol. IV at 221) Judge Lord observed that he believed the Government had made a "thoroughly substantial prima facie case that certain of these patents were fraudulently obtained," (Edelblute Tr. Vol. IV at 418) and that "There is an indication at this point that several of the defendants were privy to that fraud, prima facie again." (Edelblute Tr. Vol. IV at 419)

Judge Lord continued:

> "Well, so we may have two proceedings. We may have one proceeding to void the patents ab initio, where the Government has already asked for that. We may have another proceeding, or, at least, some moves toward the end that something should be done to vindicate the integrity of the judicial system.
>
> "I am rather disturbed by what I see by way of

> procedures in the Patent Office, and I am also disturbed by the fact that if the Government's decision to settle this case is based upon the payment of money, then they should never have brought Count I in the first place, and if they settle Count I for the payment of money on Counts 2 and 3, then it's possible here in America to buy a monopoly. And that disturbs me. I am not sure that is the way our country works." (Edelblute Tr. Vol. IV at 421, 422)

At a pretrial conference on September 2, 1971, Judge Lord again raised the question of the United States Government settlement, but on that occasion he openly expressed his overriding concern that the remaining plaintiffs would be adversely affected if deprived of the help of the Antitrust Division's adversary skills and resources:

> "THE COURT: You see, I recognize the problem that would be created by the government settling now. . . .
>
> * * *
>
> . . . So what is the Attorney General doing if he proposes to settle this case? He is saying: 'You can do what you want to in the Patent Office, even though we have a prima facie case'; and he is saying if the states come in, and court after court has stated that the reason for allowing the longer statute of limitations is to allow the government to lead the way in antitrust cases, because of the peculiar ability that the government has, the incisive way they have of getting at the facts; here we have both of those reasons, and apparently the Justice Department wants to blow them both out of the water." (Tr. at 43-45)

At Judge Lord's request, Lewis Bernstein, Chief of the Special Litigation Section of the Antitrust Division, appeared on September 8, 1971, before the Court to respond to the Court's inquiry regarding the prospects of a settlement of the United States case. Judge Lord questioned Mr. Bernstein in an attempt to dissuade the Government from effecting the settlement:

"THE COURT: Now, I don't want to argue with you, but let me ask you this. When you filed Count 1, didn't you think you had a prima facie case?

"MR. BERNSTEIN: Yes, your Honor.

"THE COURT: Have you developed any new evidence along that line?

"MR. BERNSTEIN: We have developed evidence so that we believe that our case is strong.

"THE COURT: Did you think the public interest required you to file Count 1 when you filed it?

"MR. BERNSTEIN: Yes, Your Honor.

"THE COURT: What has changed about the public interest? Disregard Counts 2 and 3 and tell me what factors have changed concerning the interest of the public in this language, and let me at this point read to you some language I know you are very familiar with, but I want anybody who [is] reviewing this record to know what it was when somebody said Judge Lord was prejudiced, Judge Lord became an advocate, Judge Lord became overzealous."

* * *

". . . Well, many of these cases were brought in '54 and '55, in this, the Southern District of New York, and I read this language to you for the purpose of getting your explanation. And again it is entirely an executive province and an executive prerogative to decide, but it would be interesting, I think, here, on the record, to say what it is that has prompted the Department of Justice to say that only a few short years ago it thought it had a great deal of justification for proceeding to cancel these patents, that it had a legal basis for it, that the public interest demanded it, and this was the posture of the Department of Justice, and now to say, when your case is, as you say, stronger, that you have more evidence, that you should not proceed to do that. I really believe that there is a very great question as to whether I could or should require you to proceed, but it would be of great interest, I think, and not only of academic interest, but it would be interesting to know why you now feel that you were wrong in your original assessment of this case." (Tr. at 30-33)

* * *

"That is all well and good except your first statement, that the defendants were tying the settlement, the delivery of the money, to a dismissal of

> the public interest count, number 1. I just want you to think about it. It is a problem that I have not been able to satisfactorily rationalize. It is, as I have said before, something like using a criminal prosecution to collect a civil debt; then canceling the criminal prosecution after the debt is paid. Or, on the other hand, it might be analogous to buying a monopoly. Either one of them are not quite consistent with what we ordinarily think of as being the duty of a litigant or of a law enforcement official." (Tr. at 45-46)

Although Judge Lord's professed interest in the Government settlement related only to Count I (an action against Pfizer only to cancel its tetracycline patent) (Edelblute Tr. Vol. IV at 221) he also demanded that the Government advise him when the conspiracy alleged in another count ended:

> "I would appreciate your written submission to include your conclusion as to when this conspiracy ended, and to buttress up your argument that all is corrected by now settling in the manner you have described." (9/8/71, Tr. at 69)

Judge Lord's introductory statements at the September 8th hearing expressed concern "whether or not [the government's withdrawal] in fairness to the other litigants [clearly not including the defendants] . . . is appropriate at this time" (Tr. at 5). Thereafter, the Court stated:

> "I think men like the leaders of the Plaintiffs National Steering Committee who are here, or Bob Murphy, the Assistant Attorney General from California, or Mr. Benoy from North Carolina, or any of these other gentlemen, -- Mr. Nugent -- would be helpless to go through these aspects of the documents [the patent aspects]. I just don't think they are that much better than I am at this field." (Tr. at 50)

Judge Lord further advised government counsel as to the effect the proposed United States settlement would have on the "game plan" as devised and being followed by him for disposition

of the pending litigation:

"THE COURT: Let me just make another little statement here so we don't have any area of mistake or mystery about what has motivated the Court in doing exactly what I have done.

I don't believe in making speeches for the record that do not truly reflect my feelings on the subject. I deliberately combined the states cases with the Federal case on the theory that it might save us a multiplicity of trials. I was fully aware of the fact that the Count 1 in equity was to be tried by the Court and we could try it with reasonable dispatch. For that very reason I sat in on Mr. Edelblute's, or a great portion of Mr. Edelblute's deposition testimony so that I could get some gague of credibility, to kind of pace the case and get the feel of it and see what it was that Mr. Owens was driving at.

All of these things have gone by the board if you settle this case. You not only in effect give the plaintiffs an added burden of trying your case, but you upset the 'game plan' which the Court, after a good deal of consideration and deliberation set as a mean of disposing not only of the cases with which I was combined, but all of these cases in one proceeding.

If it were going to come out to take the patent issue of these cases and then to turn the thing around, and if there was an invalidity of the patent just go ahead on the Walker process doctrine and handle the antitrust aspects of it.

I cannot honestly say that you will not multiply many times the problems that the Court has in handling this litigation. If I were to have found that the patent was valid and it was not obtained by fraud, the patent aspect would also go out the window and they would be put to their antitrust case without the Walker process aspect entering into it at all.

Now I say that on the record so that you hear, and you good gentlemen who are representing the defendants and feel put upon by the Court, know exactly what it is that I am talking about and what motivated me." (Tr. 40-42)

During the September 8 hearing, Judge Lord sua sponte issued an oral order to show cause why the competitor cases should not be transferred under 1404(a) to Minneapolis for trial. (Tr. at 67) Inasmuch as these cases had previously been transferred to Judge Lord for all pretrial purposes, it would appear that Judge Lord issued this order to show cause because he wanted the other plaintiffs to have the help at trial of one of the counsel for the competitor plaintiffs, whom Judge Lord regards as an experienced patent litigator. (9/2/71, Tr. at 40-41)

At the same session Judge Lord also expressed strong views regarding the role and competency of the Patent Office, and its effect on competition, which in and of itself evidences a prejudice which, given the issues of these cases, would make it impossible for defendants to have a fair trial:

> "I think you ought to tell your Attorney General if he wants to look at something he ought to look at that Patent Office. That has got to be the sickest institution that our Government has ever invented. It is just as far as I can see an attritional war between the patent applicant and the patent examiners who apparently got paid on the piece work for how many patents they could put out. And you can examine for months some poor fellows that are out doing business and finally arrive at a price structure and you might get an antitrust suit [sic]. But if you want to look, go back and look in your patent Office and see what is happening to the Patent Office. I say that for the record and for posterity. That has got to be the weakest link in the competitive system in America." (Tr. at 68-69)

10. This was not the first time Judge Lord attempted to defeat a settlement proposal being considered by the parties to this litigation.

Three months earlier, in May 1971, defendant Pfizer's counsel, John Thomas, received a phone call from Attorney Stephen Swig representing plaintiffs in the State of Hawaii action. Mr. Swig told Mr. Thomas that the Attorney General of Hawaii now wished to accept the so-called "Alabama Plan" settlement.* Mr. Thomas said that all defendants including Pfizer would accept Hawaii's offer to settle based on the Alabama Plan.

However, before defendants could implement this settlement offer it was withdrawn by a second phone call from Mr. Swig. Mr. Swig related that he had just had a telephone conversation with Judge Lord. Judge Lord had informed Mr. Swig that he would refuse to approve this settlement or any settlement at the "Alabama Plan" level. Mr. Swig said that in light of the Court's attitude the defendants should consider Hawaii's offer to settle withdrawn. Judge Lord by letter dated May 14, 1971 and addressed to counsel in all cases confirmed his telephone conversation with Mr. Swig and, apparently, with the Attorney-General himself, stating that it would be "awkward" to approve the settlement on the basis of the meagre information then before him, and stating in addition that an adoption of Judge Wyatt's prior settlement opinion would involve "an evaluation of the plaintiffs' prospects" which the Court was not prepared to do "at this time."

Particularly after the approval of the "Alabama Plan"

---

* Under an offer of February 6, 1969 as modified May 9, 1969, defendants had offered $100,000,000 to settle the claims of all states, consumers, retailers and wholesalers. As implemented this offer became known as the Alabama Plan." Under it, some $85 million was deposited in escrow for 43 accepting states, their consumers and all retailers and wholesalers in the United States. That settlement plan was approved by the District Court (Judge Inzer B. Wyatt presiding), 314 F. Supp. 710 (S.D.N.Y. 1970) and affirmed by the Court of Appeals for the Second Circuit 440 F. 2d 1079 (2d Cir. 1971).

settlements for 43 other states by the Second Circuit, Judge Lord had a duty to hold a hearing on the proposed settlement, and not to discourage and impede any further settlement on that basis.

11. The events described in paragraphs 8, 9 and 10 supra, concerning Judge Lord's actions with respect to the Edelblute deposition and the proposed settlements of the United States and Hawaii actions, are not isolated instances. The bias manifested more openly during recent events is underscored by many other incidents and events during the past year. When considered with his overall demeanor and the entire history of his handling of this litigation, it compels affiants to conclude that Judge Lord's attitude and disposition here, by reason of bias, is that of an advocate of plaintiffs' cause and a prosecutor against defendants, rather than an impartial judge. We set forth in the following subparagraphs incidents which we believe further support our conclusions of bias.

It must be appreciated that Judge Lord, an experienced and sophisticated judge, has not formally stated his bias on the record. Indeed, Judge Lord has been scrupulous in "protecting the record."

(a) On December 18, 1970, at a noon meeting in chambers attended by plaintiffs' attorneys John Cochrane and Richard Johnson, and John French and Michael Bress for defendants, Judge Lord indicated that he was going to instruct state

plaintiffs to withdraw their then pending parens patriae motions (although, in his words, as a former attorney general he was sympathetic in general with the concept) and instead emphasize the class action approach to get the money back to the persons whom he described as having been "cheated."

(b) Prior to the assignment of the litigation to Judge Lord, defendants had put in issue, in the form of requests to admit, strong evidence that certain of plaintiffs' counsel (who were seeking to represent large classes under Rule 23), had attempted to solicit clients to bring into the proceedings. During an informal lunch at Schiek's Restaurant in Minneapolis on December 12, 1970, attended by Judge Lord, J. Gordon (law clerk for Judge Wyatt) and Attorneys F. Boline, R. Johnson, J. French, M.Bress and G. Busdicker, Judge Lord brushed aside the possibility of solicitation by plaintiffs' lawyers based on his view that solicitation was a lesser evil than leaving injured people uncompensated.

(c) At the Minneapolis pretrial conference of February 9, 1971, defendants were arguing that the plaintiffs' proposed program for massive broad discovery into defendants' foreign operations was highly inappropriate and improper under the Federal Rules of Civil Procedure. Judge Lord took an unusual approach to this situation:

> "THE COURT: Well, now, let me make this observation here to you, so that you will get it and so that it be on the record, that some people have expressed the feeling that discovery should now be over, that this case has been in effect in litigation for 20 years, and that there is nothing for these plaintiffs to do except put together the known parts of this puzzle and retry the case. But the last judge that reviewed this case and reviewed everything that I know about it that exists by way of evidentiary material, said that the plaintiffs have no better than a 50-50 chance of winning, and that was Judge Wyatt. And I don't feel that

I should force the plaintiffs into trial with no more evidence in the light of Judge Wyatt's valuation. If he said there is a 50-50 chance, it's at least enough indication that there may be a lawsuit here so that I should allow discovery. If he says there is only a 50-50 chance, I am very reluctant to require that the plaintiffs go to trial with those odds against them as long as they are willing to look for more evidence." (Tr. at 203).

* * * *

"Why don't we spend more time trying to find out where, if anywhere, there are such documents in the United States. You see, what concerns me is that you plaintiffs seem to have given up on ever finding anything and establishing the case within the Continental confines of the United States, but that you are going around the outside of the crater and never getting down into the volcano where the hot stuff is." (Tr. at 209)

(d) During pretrial conferences on May 5 and June 9 of 1971, Judge Lord appealed to plaintiff United States to share its documentary resources with the other plaintiffs. (5/5/71, Tr. at 125-26; 6/9/71, Tr. at 134). The Court also indicated this sharing would be a condition precedent to the Government's right to settle with the defendants. (9/8/71, Tr. at 63, 79)

(e) During the course of discovery, defendants claimed privilege on certain documents and submitted them to Judge Lord for his in camera inspection to rule on the asserted privilege.

In addition, defendants distributed schedules setting forth the author, date and subject of each privileged document to the Court and plaintiffs. Judge Lord, sua sponte, issued to all counsel on August 9, 1971 a signed memorandum directing defendants to produce to the Court "all documents claimed as privileged including files of counsel, outside and inside, of the defendants. Counsels' files should be submitted in their entirety without exclusion of any documents, * even if thought to be non-privileged or not relevant. . . . " Later during the aforementioned Edelblute deposition, Judge Lord urged the United States Government to remain in the case and cited these documents as an inducement for them to do so. (Tr. Vol. V at 446-47, compare 9/8/71, Tr. at 49-50, 63). [No ruling on the attorney-client documents had been made at that time, and indeed none has been made to date.] Motivation behind the Court's letter of August 9 was articulated at the July 27 pretrial conference.

> "THE COURT: I want those documents [files of outside attorneys for defendants] because I have to consider the other question of whether or not you have been unwittingly tools to a scheme to promote an illegal plan.
>
> "MR. WILLIAMS [Counsel for Pfizer]: As far as I know, Your Honor, I am never an unwitting tool, and I will take exception to that.
>
> "THE COURT: When I get through with you, I may have to call you that; whether or not unwitting, maybe, or maybe if you want to be unwitting I don't know what the ruling is yet." (Tr. at 112)

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* "Internal files" of outside counsel were subsequently excluded from the scope of the memorandum.

This comment is exceptionally revealing since it was made in the absence of any suggestion by plaintiffs that defendants' counsel in these cases or in prior related cases were in any manner, either knowingly or unknowingly, connected with defendants' alleged illegal activities and since the Judge later admitted that he did not understand most of the documents on which privilege was claimed (9/8/71, Tr. at 49).

(f) In another sequence of events in early August, Judge Lord said in substance that some of Bristol's documents indicated to him that Bristol's lawyers were affirmatively participating in the "doctoring" of evidence. He also said that it was not going to bother him to find that "lawyers were part of the conspiracy." The details of these events are set forth in the separate affidavit of Frank A. Sprole.

(g) Judge Lord has also solicited lawsuits against defendants. At the pretrial conference on March 6, while recognizing that it "isn't the kind of thing to spread on the record" (Tr. Vol. I at 157) he "urged," "invited" and "drafted" (the Judge's words) a private attorney (Paul Scanlon) to go out and find some hospital patients to form a class which none of the litigating plaintiffs had yet sought to represent (Tr. Vol. I at 154).* Defense counsel, strenuously objecting to this "invitation" to engage in unethical professional conduct, pointed out that it was not the Court's duty to make certain all possible claims against defendants were being asserted (Tr. Vol. I at 159). However, Judge Lord persisted in the matter (Pretrial Conf. 3/17, Tr. Vol. I at 251; Tr. Vol. II at 33-34), to the extent of suspending the ban on class member communications entered by Judge Wyatt to protect against just such abuses. (Tr. Vol. II at 38).

* The Court subsequently dismissed the claims of the hospital patient class.

12. Each of the affiants has regretfully and reluctantly concluded that Judge Lord possesses such prejudice against the defendants that he will be unable, even exercising the greatest personal discipline, to provide defendants with a fair trial.

Julian O. Von Kalinowski
Gibson, Dunn & Crutcher
634 South Spring Street
Los Angeles, California

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

ALFRED H. HODDINOTT, JR.
Notary Public State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1972

Robert E. Cooper
Robert E. Cooper
Gibson, Dunn & Crutcher
634 South Spring Street
Los Angeles, California

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

[illegible]

John W. Thomas
Legal Division
Pfizer, Inc.
235 East 42nd Street
New York, New York

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

ALFRED H. HODDINOTT, JR.
Notary Public State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1972

Peter Dorsey
Dorsey, Marquart, Windhorst, West & Halladay
2400 First National Bank Building
Minneapolis, Minnesota 55402

Subscribed and sworn to before me this day of September, 1971.

Notary Public

Samuel W. Murphy, Jr.
Donovan Leisure Newton & Irvine
Two Wall Street
New York, New York 10005

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

ALFRED H. HODDINOTT, JR.
Notary Public, State of New York
No. 31-4928675
Qualified in New York County
Commission Expires March 30, 1972

Merrell E. Clark, Jr.
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

Subscribed and sworn to before me this 16th day of September, 1971.

Notary Public

ALFRED H. HODDINOTT, JR.
Notary Public, State of New York
No. 31-4928675
Qualified in New York County
Commission Expires March 30, 1972

Roberts B. Owen
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Subscribed and sworn to
before me this 22 day
of September, 1971.

Notary Public

Commission Expires Oct. 31, 197

Allen F. Maulsby
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005

Subscribed and sworn to
before me this 21 day
of September, 1971.

Notary Public

ALBERT F. MARCELLINO
Notary Public, State of New York
No. 43-2519700
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1973

S/ JOHN D. FRENCH

John D. French
Faegre & Benson
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402

Subscribed and sworn to before me this day of September, 1971.

Notary Public

S/ GORDON G. BUSDICKER

Gordon G. Busdicker
Faegre & Benson
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402

Subscribed and sworn to before me this day of September, 1971.

Notary Public

S/ LAWRENCE J. HAYES

Lawrence J. Hayes
Maun, Hazel, Green, Hayes,
Simon & Aretz
332 Hamm Building
St. Paul, Minnesota

Subscribed and sworn to before me this day of September, 1971.

Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	4-71-435 ALL ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	M-19-93A ALL ACTIONS

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTRY OF NEW YORK)

EDMUND T. PRATT, JR., being duly sworn, deposes and says:

1. I am Executive Vice President of Pfizer Inc., with responsibility for the administrative divisions of Pfizer Inc., including the Legal Division. I have followed events in the above entitled litigation not only because of my responsibilities as Executive Vice President, but also because of the importance of the cases to Pfizer.

2. Pfizer respectfully requests this Court, the Honorable Miles W. Lord, to recuse itself pursuant to the Fifth Amendment to the Constitution of the United States and 28 U.S.C. § 144 from proceeding further as Judge in this litigation. I have concluded that Judge Lord possesses, and has possessed from and before his assignment to these cases, strong, unshakable prejudice against the defendants, including Pfizer, and that as a result, Judge Lord has acted as a prosecutor and advocate on behalf of the plaintiffs. I am convinced that Pfizer can not obtain a fair trial with Judge Lord presiding.

3. My conclusions concerning Judge Lord's bias are based upon facts, events and observations related to me by Pfizer's counsel, and upon my own review of the proceedings herein. The specific details of the facts, events and observations upon which my conclusions are based are recited in the joint affidavit of Messrs. von Kalinowski, Cooper and Thomas, counsel for Pfizer, and other defendants' counsel, submitted herewith, which I hereby refer to and which I hereby incorporate by reference as though set forth in full herein.

WHEREFORE, defendant Pfizer Inc. demands that the Honorable Miles W. Lord proceed no further in this cause, and that another judge be assigned to hear this action.

Edmund T. Pratt, Jr.

Subscribed and sworn to before
me this 16th day of September, 1971.

Doris J. Russert
Notary Public

DORIS J. RUSSERT
Notary Public, State of [illegible]

CERTIFICATE OF COUNSEL

ROBERT E. COOPER, being Counsel of Record for the defendant Pfizer Inc., does hereby certify that EDMUND T. PRATT, JR. of Pfizer Inc. has made the attacned affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that I related to the affiant, and I certify my good faith and belief in their truth.

GIBSON, DUNN & CRUTCHER

By Robert E. Cooper
Robert E. Cooper

Attorneys for Pfizer Inc.
235 East 42nd Street
New York, New York 10017
(212) 573-3407

LAWRENCE J. HAYES, being local Counsel of Record for the defendant Pfizer Inc., does hereby certify that EDMUND T. PRATT, JR. of Pfizer Inc. has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that Robert E. Cooper, Esq. related to the affiant, and I certify my good faith and belief in their truth.

MAUN, HAZEL, GREEN, HAYES, SIMON & NEW

By /s/ Lawrence J. Hayes
Lawrence J. Hayes

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	M-19-93A ALL ACTIONS

AFFIDAVIT

HAROLD B. GROSS, being duly sworn, deposes and says:

1. I am Secretary and General Counsel of American Cyanamid Company ("Cyanamid"), a defendant in each of the above-captioned actions. Because of its extraordinary importance to Cyanamid, I have been attentive to the progress of this litigation, and I make this affidavit on Cyanamid's behalf.

2. Cyanamid respectfully applies, pursuant to the Fifth Amendment to the Constitution of the United States and 28 U.S.C. Sec. 144, for this Court, the Honorable Miles W. Lord, to recuse itself from proceeding further as Judge in this litigation. It is Cyanamid's belief that Judge Lord possesses, and has

possessed from and before his assignment to these cases, a strong, unshakable prejudice against the defendants, including Cyanamid, which has led him to adopt the mantle of prosecutor-judge in the conduct of pretrial proceedings. As a consequence, Cyanamid's ability to obtain the fair hearing which is its inalienable right is jeopardized.

3. My conclusions concerning Judge Lord's bias are based upon facts, events and observations related to me by Cyanamid's counsel and upon my own review of the proceedings herein. The specific details of the facts, events and observations upon which my conclusions are based are recited in the paragraphs of the joint affidavit of counsel submitted herewith, which I hereby refer to and incorporate herein by reference.

WHEREFORE, defendant Cyanamid demands that the Honorable Miles W. Lord proceed no further in these actions, and that another judge be assigned.

Harold B. Cross

Subscribed and Sworn to before me this 16th day of September, 1971.

Notary Public

CERTIFICATE OF COUNSEL

SAMUEL W. MURPHY, JR. and PETER DORSEY, being Counsel of Record for the defendant American Cyanamid Company, do hereby certify that HAROLD B. GROSS of American Cyanamid Company has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that we have related to the affiant, and we certify our good faith and belief in their truth.

Samuel W. Murphy, Jr.

DONOVAN LEISURE NEWTON & IRVINE
Two Wall Street
New York, New York 10005

Peter Dorsey

DORSEY, MARQUART, WINDHORST, WEST & HALLADAY
2400 First National Bank Building
Minneapolis, Minnesota 55402

Attorneys for American Cyanamid Company

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS : M 19-93A

: ALL ACTIONS

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANK A. SPROLE, being duly sworn, deposes and says:

1. I am a Vice President of Bristol-Myers Company ("Bristol") and the head of its Legal Division. In the course of my duties I have been closely following the above entitled litigation, and I make this affidavit on the Company's behalf.

2. Bristol respectfully makes application to the Honorable Miles W. Lord that he recuse himself pursuant to the Fifth Amendment of the United States Constitution and 28 USC § 144 from proceeding further as Judge in this litigation.

It is my belief that Judge Lord possesses, and has possessed since before these cases were assigned to him, a prejudice and bias against the defendants, including Bristol, and their counsel, and that this bias and prejudice has led him to assume the role of a prosecutor and advocate for the plaintiffs in the conduct of pretrial proceedings herein. As a consequence, Bristol's right to fair and impartial pretrial proceedings henceforth, and its right to a fair trial, are imperiled.

3. My belief as to Judge Lord's prejudice and bias against Bristol and its co-defendants and their counsel is based upon events and observations related to me by Bristol's counsel and upon my own knowledge of the proceedings herein. The details of these events and observations are set out below upon information and belief and in the separate accompanying Joint Affidavit of Counsel which I respectfully refer to and incorporate herein by reference.

4. On Monday, August 2, 1976, Judge Lord called a conference of counsel on short notice. Attorneys for plaintiffs and for some defendants were present, but no lawyer for Bristol was able to attend. In the course of the conference Judge Lord said in substance that some documents submitted to him by Bristol under claim of attorney-client privilege showed Bristol's lawyers telling the Company how to doctor evidence or documents. Judge Lord referred to the firm of Fish, Richardson & Neave, who have been counsel to Bristol throughout the tetracycline litigations beginning in 1954 and who are of counsel in these pending cases.

5. On the following Monday, August 9, 1971, Judge Lord held a conference with counsel and with the Special Masters who have been appointed to consider claims of privilege. In the course of the conference, Judge Lord said in substance that some of Bristol's documents indicated to him that Bristol lawyers were affirmatively participating in the doctoring of evidence. Judge Lord said in effect "it's not going to bother me to find that the lawyers were part of the conspiracy; it doesn't trouble me a bit." Judge Lord identified two documents to which he referred as a letter dated Oct. 29, 1954 from

Charles H. Walker of Fish, Richardson & Neave to Philip I. Bowman of Bristol Laboratories, bearing document No. 1002, and a letter dated Nov. 5, 1954 from Charles H. Walker to Frederic N. Schwartz of Bristol Laboratories, bearing document No. 1059 A.

6. I have examined these two letters with care. I find nothing in either letter which supports the serious charge made by Judge Lord. The only explanation which in my opinion can account for his remarks is a prejudice against the defendants and their counsel, a prejudice of which he himself may not be conscious but which is nevertheless so deep-seated and powerful as to give rise to unjustified suspicions of impropriety and to cause him to assert charges of impropriety at a meeting where Bristol was not even represented.

7. In making this affidavit it is not my intention, nor is it Bristol's intention, to waive the attorney-client privilege with respect to the documents in question. We ask that Judge Lord re-examine the letters objectively and consider whether the remarks he made with respect to them do not reveal to him a personal prejudice against the defendants and their counsel.

WHEREFORE, for the reasons given above and in the separate accompanying Joint Affidavit of Counsel, Bristol respectfully prays that Judge Lord recuse himself from proceeding further as judge in this litigation.

Sworn to before me this
16 th day of September, 1971.

Frank A. Sprole

Notary Public

J. RICHARD
Notary Public, New York

CERTIFICATE OF COUNSEL

MERRELL E. CLARK, JR., JOHN FRENCH, and GORDON BUSDICKER, being Counsel of Record for the defendant Bristol-Myers Company, do hereby certify that FRANK A. SPROLE of Bristol-Myers Company has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that we have related to the affiant, and we certify our good faith and belief in their truth.

WINTHROP, STIMSON, PUTNAM & ROBERTS

By Merrell E. Clark, Jr.
Merrell E. Clark, Jr.
40 Wall Street
New York, New York 10005

FAEGRE & BENSON

By S/ JOHN D. FRENCH
John French

By S/ GORDON G. BUSDICKER
Gordon Busdicker
1300 Northwestern Bank Building
Minneapolis, Minnesota 55402

Attorneys for Bristol-Myers Company
345 Park Avenue
New York, New York 10022

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	M-19-93A ALL ACTIONS

AFFIDAVIT

ROSS REID, being duly sworn, deposes and says:

1. I am Vice President and General Counsel of Squibb Corporation ("Squibb"), a defendant in each of the above-captioned actions. Because of its extraordinary importance to Squibb, I have been attentive to the progress of this litigation, and I make this affidavit on Squibb's behalf.

2. Squibb respectfully applies, pursuant to the Fifth Amendment to the Constitution of the United States and 28 U.S.C. Sec. 144, for this Court, the Honorable Miles W. Lord, to recuse itself from proceeding further as Judge in this litigation. It is Squibb's belief that Judge Lord possesses, and has possessed from and before his assignment

to these cases, a strong, unshakable prejudice against the defendants, including Squibb, which has led him to adopt the mantle of prosecutor-judge in the conduct of pretrial proceedings. As a consequence of Judge Lord's prejudiced, closed mind on the merits of the case and his becoming an advocate for plaintiffs and a prosecutor against defendants, Squibb's ability to obtain the fair hearing which is its inalienable right is jeopardized.

3. My conclusions concerning Judge Lord's bias are based upon facts, events and observations related to me by Squibb's counsel and upon my own review of the proceedings herein. The specific details of the facts, events and observations upon which my conclusions are based are recited in the paragraphs of the joint affidavit of counsel submitted herewith, which I hereby refer to and incorporate herein by reference.

WHEREFORE, defendant Squibb demands that the Honorable Miles W. Lord proceed no further in these actions, and that another judge be assigned.

Ross Reid

Subscribed and sworn to before
me this 16th day of September 1971.

Notary Public

GRACE D. CAFFREY, Notary Public
State of New York No. 41-5366900
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1972

CERTIFICATE OF COUNSEL

ALLEN F. MAULSBY and JOHN D. FRENCH, being Counsel of Record for the defendant Squibb Corporation, do hereby certify that ROSS REID of Squibb Corporation has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the facts and conclusions stated therein are based in part on information that we have related to the affiant, and we certify our good faith and belief in their truth.

Allen F. Maulsby

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	:	M-19-93A ALL ACTIONS

GERARD THOMAS, being duly sworn, deposes and says as follows:

1. I am Vice President and General Counsel of The Upjohn Company, a defendant in each of the above-entitled actions. Having been informed on a continuing basis as to the conduct of these cases, I make this affidavit in support of the defendants' joint motion for the disqualification of the Honorable Miles W. Lord.

2. Pursuant to 28 U.S.C. § 144 The Upjohn Company respectfully requests that the Honorable Miles W. Lord recuse himself from the present action on the ground that he has so aligned himself in support of the plaintiffs in these cases, and against the defendants, and has so demonstrated bias and prejudice against the defendants, that his immediate disqualification from the

conduct of all further proceedings in this litigation is essential in order to allow such proceedings to move forward with the fairness required by law.

3. The instant request is based upon information provided to me by defense counsel, including the information set forth in the joint affidavit of counsel submitted in support of the defendants' joint application for the disqualification of Judge Lord, which affidavit is incorporated herein by reference.

Gerard Thomas

Subscribed and sworn to
before me this 24 day
of September, 1971.

Notary Public

DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	4-71 Civ. 435 ALL ACTIONS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS	M-19-93A ALL ACTIONS

CERTIFICATE OF COUNSEL

Roberts B. Owen, John D. French, and Gordon G. Busdicker, being Counsel of Record for the defendant The Upjohn Company, do hereby certify that Gerard Thomas of The Upjohn Company has made the attached affidavit on the advice of counsel in the good faith and genuine belief that the facts stated therein and the conclusions drawn therefrom are true.

The aforesaid affidavit and the matters stated therein are based on information that we have related to the affiant, and we certify our good faith and belief in their truth.

COVINGTON & BURLING

By _____
Roberts B. Owen

FAEGRE & BENSON

By _____
John D. French

By _____
Gordon G. Busdicker

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

Petitioners,

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE CITY COUNCIL OF THE CITY OF MINNEAPOLIS, MINNESOTA, URGING DENIAL OF THE PETITION

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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

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BRIEF OF AMICUS CURIAE CITY COUNCIL OF THE CITY OF MINNEAPOLIS, MINNESOTA, URGING DENIAL OF THE PETITION

Pursuant to Rule 42 of the Supreme Court of the United States, as a political subdivision of a state, and with consent of the parties, which written consents have been filed with the Clerk of this Court, the City Council of the City of Min-

neapolis, Minnesota, respectfully files this brief as amicus curiae urging the Court to deny the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The interest of the City Council of the City of Minneapolis, Minnesota, derives from its status as the governing body of the City of Minneapolis, a municipal corporation, organized under the laws of the State of Minnesota pursuant to a Home Rule Charter.

The Minneapolis City Council is comprised of thirteen Aldermen, each of whom is elected by the people who reside in the respective thirteen wards of the City.

Section 5 of Chapter 4 of the Minneapolis City Charter provides that the City Council has ". . . full power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the government and good order of the city. . . ."

Pursuant to its power under the Minneapolis City Charter, the City Council on August 25, 1967, passed Chapter 945 of the Minneapolis Code of Ordinances, which provides in part:

> "(a) *Findings.* It is determined that discriminatory practices based on race, color, creed, religion, national origin, or sex with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations, and public services, or any of them, tend to create and intensify conditions of poverty, ill health, unrest, civil disobedience, lawlessness, and vice and adversely affect the public health, safety, order, convenience, and general welfare; such discriminatory practices threaten the rights, privileges and opportunities of all inhabitants of the city and such rights, privileges and opportunities are hereby declared to be civil rights, and the adoption of this ordinance is

deemed to be an exercise of the police power of the City to protect such rights.

(b) *Declaration of Policy and Purpose.* It is the public policy of the City of Minneapolis and the purpose of this ordinance—

(1) To declare as civil rights the rights of all persons to the fullest extent of their capacities, and without regard to race, color, creed, religion, ancestry, national origin or sex, equal opportunities with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations, and public services;

(2) To prevent and prohibit any and all discriminatory practices based on race, color, creed, religion, ancestry, national origin, or sex with respect to employment, labor union membership; housing accommodations, property rights, education, public accommodations, or public services. . . ."

Through the exercise of its police power, the Minneapolis City Council has the duty to provide for the health, safety, and general welfare of the citizens of Minneapolis. By an official Resolution passed on February 11, 1972, vetoed on February 15, 1972 by Mayor Charles Stenvig, and officially passed again on February 25, 1972, by a ten to three vote, thereby overriding the Mayor's veto, the Minneapolis City Council formally resolved:

"Whereas, the District Court in St. Louis has made a decision requiring the selecting of one minority fireman out of every three hired; and

Whereas, Minneapolis Fire Dept. leaders favor this solution to give minorities an increased opportunity to join the Fire Dept.; and

Whereas, the long delay involved in reaching this decision has resulted in a critically undermanned Fire Dept.; and

Whereas, now is the time to make a decision and resume the hiring of badly needed firemen;

Now, Therefore, Be It Resolved by the City Council of the City of Minneapolis:

That the Civil Service Commissioners be strongly encouraged to abide by the St. Louis court decision and that no appeal be made to its ruling."

By further action on March 10, 1972, by a ten to three vote, the Minneapolis City Council by motion directed the City Attorney to prepare an amicus curiae brief on behalf of the City Council in this case, ". . . said brief to be supportive of the contentions of the plaintiffs [Respondents], that the best interests of the City would be served by conclusion of the case at the earliest possible time and that the Writ of Certiorari not issue."

The Minneapolis City Council, as the governing body of the City of Minneapolis, is concerned about the health, safety, and general welfare of the citizens of Minneapolis, and it believes that those concerns will be detrimentally affected in two major ways if a Writ of Certiorari is issued:

1. The Minneapolis Fire Department is drastically undermanned, and prolonged litigation will make it difficult, if not impossible, to recruit personnel because of the uncertainty about a new employee's status pending legal review. The undermanned Fire Department poses a threat to the health and safety of the citizens of Minneapolis.

2. Prolonged litigation where long-standing racial discrimination in employment has been unequivocally proven may make recruitment of minority firemen difficult, and may upset the alleged delicate balance which exists between the minority and majority communities in Minneapolis.

ARGUMENT

United States Supreme Court Rule 19 states in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

The Rule then lists the factors the Court considers in deciding whether to grant certiorari. After reviewing these factors and reading the Petition and the amicus curiae brief of Mayor Charles Stenvig, it is embarassingly obvious that there is a glaring absence of any "special and important reasons" for granting certiorari.

The Petitioners' reasons for granting the writ may be succinctly stated as follows:

1. The seven Eighth Circuit Court of Appeals judges who decided this case on January 7, 1972 were wrong, and the two dissenting justices were right.

2. Dictum of the court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 9 S.Ct. 849, 28 L.Ed. 158 (1971), suggests that the two dissenting justices were right.

Neither the Petitioners nor their *amicus* cite one single United States Supreme Court decision or United States Circuit Court decision which is clearly in conflict with the decision in this case. *Griggs v. Duke Power Co., supra*, held that while an employer may adopt a requirement or utilize a test that will determine if an applicant is fit for the job, an employer may not, under Title VII of the Civil Rights Act of 1964, adopt an employment practice which has the effect of excluding minorities, whether intentionally discriminatory or not, unless the employment practice can be shown to relate to job performance. To cite *Griggs, supra*; for any other proposition is to cite dicum, and a conflict, if any, be-

tween dictum and the instant case is not a basis for granting certiorari under Rule 19.

After a three-judge Circuit Court panel (two circuit judges, one district judge) originally decided this case on September 9, 1971, the United States Justice Department filed a lengthy amicus curiae memorandum on behalf of the United States supporting the Petition for Rehearing and suggesting that the Circuit Court reconsider the three-judge decision, so that the Eighth Circuit would be in harmony with other circuits. In his memorandum, the United States Attorney General suggested that in light of the findings in this case and previous appellate decisions, it was not an abuse of discretion for the trial court to grant an absolute preference to 20 qualified applicants. However, as an alternative, he suggested a formula of one qualified white and one qualified minority be certified on an alternating basis until the present effects of past discrimination have been overcome. In fashioning a remedy of preference for one qualified minority applicant for every two qualified white applicants until 20 minority applicants have been hired, the Eighth Circuit Court's decision does not go as far as the United States Attorney General felt would be appropriate or legally permissible.

The Petitioners raise a specious and tangential issue when they argue the decision in the instant case conflicts with the goal of obtaining the best qualified public employees through fair and objective hiring practices.

First, in light of the findings of the trial court, it is indeed ironic for the Petitioners to now assume a posture of being interested in objective hiring practices. The trial court found that the Petitioners, as defendants, helped to maintain an all white Fire Department. They now urge this

Court, in the name of objective hiring practices, to reverse or modify a decision that will assure a minimal amount of racial integration in a previously all white department.

Second, under Minnesota law, a veteran with the lowest passing score is given absolute preference in municipal employment over a non-veteran with the highest possible score. By giving some preference to racial minority applicants who qualify by passing all examinations, we are to a small extent correcting a past wrong in the same manner we do for veterans. While veterans are easily identifiable, all the racial minority persons who were affected by the discriminatory policies of the Petitioners are not easily ascertainable. Therefore, the remedy of necessity must be fashioned to the class rather than to the individual as in the case of veterans.

Third, the Petitioners approved Minneapolis Civil Service Commission Fire Fighter Examination Plan Number 8326 in 1970, but were enjoined from hiring under that plan by the trial court. Under that plan applicants were to be divided into four groups if they passed all examinations. The first group to be hired would be veterans who had been residents of Minneapolis for one year preceding the closing of the application period. The second group to be hired would be non-veterans who had been residents of Minneapolis for one year preceding the closing of the application period. The third group to be hired would be veterans who had not lived in Minneapolis for the preceding year. The last group to be hired would be non-veterans who had not lived in Minneapolis for the preceding year.

Minneapolis, a central city with a high percentage of retired residents, contains about one-fourth of the residents of the Minneapolis-St. Paul metropolitan area. Arguably, if the Petitioners wanted the most qualified public employees

they would not grant absolute preference in initial hiring to residents of Minneapolis over higher scoring non-residents. The posture the Petitioners now take with respect to seeking the best qualified public employees is diametrically opposite from what they actually did in adopting Examination Plan 8326 prior to this case and from what they were found to have done in the past by the trial court.

CONCLUSION

The Petitioners and their *amicas* have failed to demonstrate the existence of any special or important reasons to justify the issuance of a writ of certiorari in this case.

The decision of seven out of nine Eighth Circuit Court of Appeals Justices in this case is in harmony with previous decisions of the United States Supreme Court and the United States Circuit Courts, and follows a suggestion of the United States Justice Department as contained in its amicus curiae memorandum on behalf of the United States filed with the Eighth Circuit in support of the Petition for Rehearing.

When blatant racial discrimination in employment has affected a class over a period of many years, a trial judge has wide discretion to implement an effective remedy. The remedy in this case is designed to integrate an all white department with fully qualified minority firemen. In view of past practices, the lower courts determined that the only way to do so was to assure some minority applicants that they would be hired if they qualified irrespective of previous discriminatory practices, veterans preference, and residency rules. Since the lower courts did not abuse their discretion their decision should stand.

This case is unique to the City of Minneapolis, and as such will not arise again and will not have universal applicability.

For these reasons a Writ of Certiorari should not issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MEYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY

Petitioners

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and Named PLAINTIFFS IN FORTY-EIGHT OTHER CASES

Respondents

PLAINTIFFS-RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the
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OCTOBER TERM, 1971

No. 71-1285

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MEYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY

Petitioners

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and Named PLAINTIFFS IN FORTY-EIGHT OTHER CASES

Respondents

PLAINTIFFS-RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Plaintiffs-Respondents, by their Plaintiffs National Steering Committee,[1] submit this brief in opposition to the

[1]Pretrial Order No. 1, *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, M 19-93A, (February 24, 1970, S.D.N.Y.) designated Committees of Counsel representing certain functional classes of parties, to assist in coordination of pretrial activities. These committees included a Committee of Government Plaintiffs Counsel, a Committee of Farm Plaintiffs Counsel, a Committee of Miscellaneous Plaintiffs Counsel, a Committee of Defense Counsel, and a Committee of Private Hospital Plaintiffs Counsel (representing clients who have since settled their cases). Pretrial Order No. 1 further established the Plaintiffs National Steering Committee, composed of representatives of each committee of plaintiffs counsel. The Steering Committee was directed to do whatever is reasonably possible to coordinate the activities of all plaintiffs without duplication of activities.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in *Pfizer, Inc. v. Honorable Miles W. Lord*, No. 71-1580 (8th Cir., February 15, 1972).

QUESTION PRESENTED

Should this Court grant the Petition for a Writ of Certiorari when the Court of Appeals has concluded on the basis of the standards enunciated in the applicable decisions of this Court that petitioners' affidavit failed to disclose a legally sufficient basis for recusing the trial judge on grounds of "personal bias and prejudice."

STATEMENT OF THE CASE

The Court of Appeals, having first reviewed the lower court's comments and actions and evaluated them against circumstances and standards set forth in the decisions of this Court and other appellate courts, found that "the facts contained in petitioners' affidavit fall short of showing the bias and prejudice needed to recuse." (Pet. App., 28a). There are no special or important reasons which necessitate a review of this decision.[2]

1. History and Status of this Litigation

These actions all arose out of a Federal Trade Commission proceeding instituted against petitioners in 1958,[3] and

[2]See Supreme Court of the United States, *Revised Rules*, 19.

[3]*In the Matter of American Cyanamid Company, et al.*, Docket No. 7211 (complaint filed July 28, 1958), *order vacated and remanded*, 363 F.2d 757 (6th Cir. 1966), *order after remand aff'd, sub nom., Chas. Pfizer & Co., Inc. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

a criminal anti-trust action brought by indictment in the Southern District of New York in 1961.[4]

More than one hundred and fifty such actions were brought in districts throughout the country including the District of Minnesota. Each of the actions alleges in substance that commencing not later than 1953, the defendants combined and conspired to restrain interstate and foreign trade and commerce in the manufacture, sale and distribution of tetracycline and other broad spectrum antibiotic products and that they also conspired to and did monopolize the manufacture, sale and distribution of those products in interstate and foreign commerce. As one of the means of effectuating this illegal monopoly and conspiracy in restraint of trade, certain of the petitioners failed to present and fraudulently misrepresented known facts in the procurement of a product patent from the United States Patent Office.

In the fall of 1968, the Judicial Panel on Multidistrict Litigation commenced transferring these actions to the Southern District of New York for coordinated pretrial proceedings pursuant to *28 U.S.C.* §1407.[5] All actions were originally assigned to the Honorable Inzer B. Wyatt. On February 6, 1969, two separate settlement offers were made to various groups of plaintiffs. Throughout 1969 and

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[4]*United States v. Chas. Pfizer & Co., Inc.*, 61 Cr. 772 (Indictment returned August 17, 1961), *rev'd for new trial*, 426 F.2d 32 (2nd Cir. 1970), *prior en banc hearing order vacated, opinion of panel modified, and petition for rehearing denied*, 437 F.2d 957, aff'd by equally *divided court*, 40 U.S.L.W. 3348 (1972).

[5]*In re Antibiotic Drug Litigation*, 295 F. Supp. 1402 (J.P.M.L. 1968). Subsequent transfers are reported at 309 F. Supp. 155 (J.P.M.L. 1970), 301 F. Supp. 1158 (J.P.M.L. 1969), and 299 F. Supp. 1403 (J.P.M.L. 1969).

subsequently, hearings were held on one of these offers which was ultimately approved by the Court.[6]

The second settlement offer mentioned was initially rejected by those to whom it was extended. Subsequently, a new offer was extended to a smaller group of Plaintiffs. This offer was accepted by a majority of those to whom the offer was extended, and was approved by the Court.[7]

These cases pose complex legal and administrative problems of enormous porportions. The burdens on the time and energy of the Court were multiplied many fold by the two settlements, each of which had to be administered and approved independent of one another and independent of the "non-settling" cases.

By early fall of 1970, it was apparent that the awesome burdens imposed upon Judge Wyatt were too much for one person. In the hopes of dividing up this burden and of expediting the litigation, plaintiffs moved the Judicial Panel on Multidistrict Litigation for an order transferring the cases from the Southern District of New York to the District of Minnesota, a district with a much less burdened calendar.[8] On December 2, 1970, the Panel assigned the "non-settling" cases to Judge Lord who was specially designated by the Chief Justice of this Court to sit in the Southern District of New York.[9]

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[6] *West Virginia v. Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871.

[7] *Hartford Hospital v. Chas. Pfizer & Co., Inc.*, 1971 Trade Cas. ¶ 73,561 (S.D.N.Y. 1971).

[8] Prior to making such a motion, plaintiffs' counsel discussed the matter with Judge Wyatt and defendants' counsel. During that discussion, Judge Wyatt informed the parties that he himself had "asked the Panel to consider whether the actions which are not settling should not be assigned to another Judge."

[9] *In re Antibiotic Drugs*, 320 F. Supp. 586 (J.P.M.L. 1970).

Judge Wyatt had, of necessity, devoted much of his time and energies in this consolidated litigation to the "settling cases." Consequently, prior to Judge Lord's assignment, only four orders of general application had been issued in these "non-settling" cases. At the time of his assignment, there were approximately twenty-two categories of matters pending. Although maintaining his regular duties in the District of Minnesota, Judge Lord immediately began moving forward. Between his appointment and the filing of the affidavit which gave rise to this Petition, there were seventeen pretrial hearings of record and many smaller conferences with the court and the parties. These hearings alone have filled an excess of three thousand two hundred pages of transcript and involved more than twenty-eight days. Over eighty-five orders have been issued, in addition to the many rulings from the bench. Petitioners have sought appellate review of four of the lower Court's orders by way of Petitions for Writs of Mandamus. Three of the four petitions have been denied in their entirety.[10] The fourth was denied in substantial part.[11]

Many of the matters before Judge Lord for decision required him to make a thorough evaluation of the prior Federal Trade Commission and criminal case record as well as acquire an intimate familiarity with the pleadings and documents produced by discovery in these cases. For example, plaintiffs sought a ruling that the Federal Trade Commission proceeding and criminal proceeding tolled the

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[10] *Pfizer Inc. v. Lord*, — F.2d — No. 71-1580, (8th Cir., February 15, 1972) (Pet. App. 3a-30a); *Pfizer, Inc. v. Lord*, 449 F.2d 119 (2nd Cir. 1971) (approving establishment of consumer class actions); *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2nd Cir. 1971) (affirming transfer of cases pursuant to *28 U.S.C.* §1404(a)).

[11] *Pfizer, Inc. v. Lord*, — F.2d — No. 71-1581, (8th Cir., February 15, 1972), discussed *infra* at 6-8.

statute of limitations pursuant to *15. U.S.C.* §16(b) and that they were entitled to utilize the findings of the Federal Trade Commission proceedings as *prima facia* evidence in these cases under *15 U.S.C.* §16(a). After reviewing these prior proceedings and the pleadings in these cases, Judge Lord ruled that the prior Federal Trade Commission and criminal proceedings tolled the statute of limitations in these cases but that the plaintiffs could not rely upon the findings of the Federal Trade Commission as *prima facia* evidence at trial, since the Federal Trade Commission proceedings did not satisfy all of the definitional requirements of *15 U.S.C.* §16(a).[12]

Also, defendants refused to turn over certain documents sought by plaintiffs through discovery procedures, on the grounds that the documents were protected by an attorney-client privilege. Plaintiffs contended that there was *prima facia* evidence that defendants engaged in conduct constituting a crime, tort or fraud and, therefore for purposes of discovery, the documents were not protected by an attorney-client privilege because the attorney's advice was used by defendants in furtherance of their unlawful schemes.[13] In order to resolve this question, at the suggestions of the petitioners, the court appointed three impartial Masters[14]

[12]*In re Antibiotic Antitrust Actions*, 333 F. Supp. 317 (S.D.N.Y. 1971).
[13]See *Clark v. United States*, 289 U.S. 1, 15 (1933).
[14]The three Masters appointed by the Court were:

Leonard E. Lindquist (L.L.B., University of Minnesota), Lindquist & Vennum, Minneapolis, Minnesota; National Director and Chairman of the Regional Advisory Counsel, American Arbitration Association.

Douglas R. Heidenreich (J.D., magna cum laude, William Mitchell College of Law), Dean, William Mitchell College of Law, St. Paul, Minnesota.

Murray L. Galinson (J.D., cum laude, University of Minnesota), visiting Associate Professor, California Western School of Law, San Diego, California.

to assist him in the review of all of the questioned documents and to evaluate them in the light of the evidence presented and made public during prior investigative[15] and judicial proceedings,[16] and the evidence produced pursuant to discovery in the present litigation. The Masters concluded that a *prima facia* showing of fraud on the Patent Office had been made against petitioners Pfizer and Cyanamid and that all documents which dealt with the procurement and enforcement of the patent and the furtherance of the fraud, were not protected by the attorney-client privilege. They further found that the evidence showed a *prima facia* violation of the Sherman Act by petitioners Bristol, Squibb and Upjohn.

Petitioners sought a Writ of Mandamus from the Eighth Circuit Court of Appeals on this issue. As to the lower Court decision regarding petitioners Cyanamid and Pfizer, the Court of Appeals affirmed noting:

> "The Masters found on the basis of the prior F.T.C. proceeding that a *prima facia* case of fraud had been made against these two companies. We agree. The F.T.C. found that Pfizer and Cyanamid had committed a fraud on the patent office in connection with the issuance of a patent. The Sixth Circuit affirmed that finding. *Pfizer and Co. v. F.T.C.*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). Certainly the final decision of the Court of Appeals

[15]See Federal Trade Commission, Economic Report on Antibiotics Manufacture (1958); *Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, on Administered Prices in the Drug Industry*, 86th Cong. 1st and 2d Sess., Vols. 14-26 (1959-60); Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, A Study of Administered prices in the Drug Industry, S. Rep. No. 448, 87th Cong., 1st Sess. (1961).

[16]e.g., cases cited notes 3 & 4, *supra*.

of the Sixth Circuit is adequate to form a basis for the finding of a *prima facia* case of fraud." *Pfizer, Inc. v. Lord*, No. 71-1851 at 11 (8th Cir., February 15, 1972).

The Circuit Court disagreed with the lower court's findings with respect to petitioners Bristol, Squibb and Upjohn and ordered the lower Court to vacate its order as to those defendants without prejudice. *Id.* at 10-11.

2. Proceedings Below

On September 17, 1971, the petitioners filed their affidavits of prejudice and bias pursuant to *28 U.S.C.* §144 (Pet. App. 31a-76a). On September 20, 1971, the Court denied the application for "legal insufficiency."

The Petition for a Writ of Mandamas was filed on October 13, 1971. An answer was submitted by plaintiffs in the sincere belief that the granting of the relief requested in the petition and the consequent appointment of a new judge, unfamiliar with these complex cases, would substantially delay the lower court proceedings and that such delays would seriously prejudice the rights of plaintiffs to receive an efficient and reasonably expeditious adjudication of their claims.[17]

On February 15, 1972, the United States Court of Appeals for the Eighth Circuit issued an opinion denying the requested Writ. (Pet. App. 3a-30a).

3. Findings of the Court of Appeals

In its twenty-six page opinion, the Eighth Circuit ex-

[17]As noted in the Petition, page 5, Judge Lord did not respond: "for of what concern is it to a judge to preside in a particular case?" *Berger v. United States*, 255 U.S. 22, 35 (1921).

amined all of the factual allegations relied on by petitioners and, with respect to each, stated its conclusion. Petitioners description of the findings of the Court of Appeals ignores these conclusions and instead, confines itself to carefully truncated excerpts culled from the opinion.

Petitioners asserted that Judge Lord manifested a biased state of mind while attending the deposition of Harvey W. Edelblute, former patent counsel for petitioner American Cyanamid Company.[18] The Court below, after reviewing over one thousand pages of that deposition transcript and tape recordings of portions of said deposition, stated: "Edelblute did not always respond directly to the questions asked, even when they were asked in a clear-cut manner." (Pet. App. 16a). The court went on to say:

> ". . . we are not impressed with the petitioners' claims that Judge Lord demonstrated personal bias and prejudice through his comments at the deposition, or by his interrogation, of Edelblute . . . *the remarks fail to reflect any personal bias or prejudice.*" (Pet. App. 18a) (emphasis added).

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[18]Harvey W. Edelblute was responsible for the prosecution of Cyanamid's Aureomycin and tetracycline patent applications and was a participant in events relating to the patent aspects of this litigation. (Pet. App. 38a). With respect to these activities Edelblute filed remarks with the patent office which, among other things, unequivocally stated that there had not been any prior production by his company of the product in question. The Federal Trade Commission found that these remarks were "erroneous". It further found that Edelblute failed to disclose information known to him of inherent prior production even though he knew that this was precisely "the type of information the patent examiner desired." *In the matter of American Cyanamid Company*, Docket No. 7211, Finding as to the Facts and Conclusions of Law, 13, (August 8, 1961), adopted by final order, (September 29, 1967), *aff'd sub nom., Chas. Pfizer & Co., Inc.* v. *Federal Trade Commission*, 401 F.2d 574, 582-83 (6th Cir. 1968), *cert. denied* 394 U.S. 920 (1969).

With regard to the "Hawaii settlement," which petitioners asserted was arbitrarily rejected by Judge Lord, the Court below stated:

> "In a letter to all parties . . . Judge Lord . . . related that it would be 'awkward' for him to approve the settlement on the basis of the meager information then known to him. The letter also stated that the adoption of Judge Wyatt's settlement plan would involve 'an evaluation of plaintiffs' prospects' which the Court is not prepared to make at that time . . . Judge Lord stated in the letter that his rejection of the proposed settlement would be without prejudice to renewing the request at a later time. In the light of the meager information available on this issue, petitioners cannot prevail." (Pet. App. 19a).

With respect to the allegations that Judge Lord had attempted to solicit a class suit comprised of hospital patients, the Eighth Circuit reviewed the alleged comments and facts set forth in petitioners' affidavit and concluded as follows:

> "After consideration of all aspects of the claims of hospital patients, Judge Lord directed that they be dismissed. We have considered this comment and other comments referred to in petitioners' affidavit. In light of the record, we reject the contention that such remarks, individually or collectively, manifest personal bias against petitioners." (Pet. App. 20a).

The Circuit Court then directed its attention toward comments made by Judge Lord at a hearing called to "consider the 'court's role' relating to the 'public interest aspects' of a proposed settlement between petitioners and the United States." The Court below deemed these comments "critical" to an "evaluation of the sufficiency of petitioner's

charges." (Pet. App. 20a). Upon review of each of the complained comments, the Court stated:

> "The record manifests Judge Lord's obvious perturbation over the contemplated settlement. His words were strong. *Yet his ire seems directed not at petitioners but at the government,* which, according to Judge Lord, might be selling out the public interest."[19] * * *

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[19]The Court of Appeals was correct in concluding that the District Courts interest in the conditions and circumstances surrounding the proposals for settlement of the Federal Government action afforded no grounds for recusal of the trial court judge. The Government is seeking, under Count I of its complaint, the cancellation of the Conover patent upon the grounds that it was procured by fraud. Judge Lord was advised that part of the proposed settlement was the dedication of the balance of the patent term and that the Government then intended to dismiss its cancellation action. At the time that these proposals were brought to Judge Lord's attention, Judge Lord was aware that the 6th Circuit Court of Appeals had found that there was "clear, unequivocal and convincing," evidence that the Conover patent had been procured by fraud. *Chas. Pfizer & Co., Inc.*, v. *Federal Trade Commission*, 401 F.2d 574 (1968). Judge Lord's inquiry only tended to ellicit what the power, duty and obligation of the courts were when an action seeking cancellation of a fraudulently procured patent was about to be dismissed. Judge Lord was aware of the mandate stated by this Court in *Hazel-Atlas Glass* v. *Hartford-Empire Co.*, 322 U.S. 238, 251 (1944):

> "To grant full protection to the public against a patent obtained by fraud, the patent *must* be vacated. It has previously been decided that such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceedings brought by the Government. *United States* v. *Bell Teleph. Co.* 128 U.S. 315, 32 L.Ed. 450, 9 S. Ct. 90, *supra.*" (emphasis supplied).

This Court in that case also stated:

> "This matter does not concern only private parties. *There are issues of great moment to the public in a patent suit. Mercoid Corp. v. Mid-Continent Invest. Co.* decided January 3, 1944 [320 U.S. 661, ante, 376, 64 S. Ct. 268]: *Morton Salt Co. v. G. S. Suppiger Co.* 314 U.S. 488, 86 L. ed. 363, 62 S. Ct. 402. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong

"We note, however, that the Court's remarks concerning the public interest in the settlement of Count I rested upon Judge Lord's assumption, frequently stated in the record, that the government prove the truth of its allegations. Moreover, Judge Lord's concern over the upsetting of his 'game plan' in managing the litigation may have been better left unsaid, but *that statement does not manifest any personal bias and prejudice toward petitioners.*"[20] (Pet. App. 24a-25a) (emphasis added.)

With respect to Judge Lord's comment concerning the role and efficiency of the Patent Office,[21] the Court of Appeals concluded:

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against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." 322 U.S. at 246 (emphasis supplied).

The above quotations highlight the strong judicial concern for the public and judicial interest in the cancellation of any patent procured by fraud and the protection of the integrity of the judicial system.

[20]Judge Lord's concern over the effect upon his game plan must be considered in light of his mandate from the Judicial Panel on Multidistrict Litigation:

"We are certain that Judge Miles Lord will direct discovery in such a way that pretrial in all 'non-settling cases' will proceed expeditiously and efficiently and without delay or duplication." *In re Antibiitic Drugs*, 320 F. Supp. 586, 590-91 (J.P.M.L. 1970).

[21]It is worth noting that this Court expressed similar concern in *Graham v. John Deere Co.*, 383 U.S. 1, 18-19 (1966), wherein it is stated:

"We have observed a notorious difference between the standards applied by the Patent Office and by the courts. While many reasons can be adduced to explain the discrepancy, one may well be the free rein often exercised by Examiners in their use of the concept of 'invention.' In this connection we note that the Patent Of-

> "Nevertheless, even if we accept petitioners' arguments that these comments disclose a prejudicial attitude concerning the relationship between petitioners and the Patent Office, these observations may have come as a result of Judge Lord's exposure to the prior proceedings. Thus, although Judge Lord's comments were gratuitous and wholly extraneous to the question then before him *we cannot say that they reflect an 'extrajudicial bias' as is required for recusal under Grinnell, supra.*" (Pet. App. 25a) (emphasis added).

Finally, the Court reviewed the comments and actions of Judge Lord and evaluated them "against circumstances disclosed in cases in which appellate courts [including this Court] have forced a judge to recuse himself or reversed a judgment because of demonstrated bias and concluded that "[t]he facts contained in petitioners' affidavit fall short of showing the bias and prejudice needed to recuse." (Pet. App. 28a).

REASONS FOR DENYING THE WRIT

I.

The Eighth Circuit Properly Applied the Law, Including the Decisions of this Court, in Reaching Its Decision.

Section 144 of the *Judicial Code*, Title 28, set out in full in the Petition, page 3 states in pertinent part:

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fice is confronted with a most difficult task. Almost 100,000 applications for patents are filed each year. Of these, about 50,000 are granted and the backlog now runs well over 200,000. This is itself a compelling reason for the Commissioner to strictly adhere to the 1952 Act as interpreted here. This would, we believe, not only expedite disposition but bring about a closer concurrence between administrative and judicial precedent."

> "Whenever a *party* to any proceeding in a district court makes and files a timely and *sufficient* affidavit that the judge before whom the matter is pending *has a personal bias or prejudice either against him or in favor of any adverse party,* such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> *The affidavit shall state the facts and the reasons for the belief* that bias or prejudice exists, . . ." (emphasis added).

In *Berger v. United States,* 255 U.S. 22 (1921), the question of the judges duty when confronted with an affidavit filed under the predecessor to Section 144 was presented. In that case, this court noted ". . . a distinction between determining the legal sufficiency of the affidavit and passing upon the truth of its statement, . . ." 255 U.S. at 32. The court held that the statute withdraws from the judge, a decision on the truth of the matters alleged in the affidavit. In clarifying its decision the Court set forth certain guidelines for determining the legal sufficiency of an affidavit filed pursuant to the questioned statute. It noted:

> "[O]f course, the reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34.

Later the court restated this requirement in the following language:

> "We are of the opinion, therefore, that an affidavit upon information and belief satisfies the section, and that, upon its filing, if it show the objectionable inclination or disposition of the judge, which we

have said is an essential condition, it is his duty to proceed no further in the case." 255 U.S. at 35.

Upon review of the affidavit before it, this Court found that:

> "The facts and reasons it states are not frivolous or fanciful, but substantial and formidable, and they have relation to the attitude of Judge Landis's mind toward defendants." 255 U.S. at 34.

Forty-five years after its decisions in *Berger* this Court again considered the decision of a lower court which denied a motion pursuant to Section 144. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). After reviewing the allegations relied on, the Court stated the standard to be applied in these cases, as follows:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *Berger v. United States*, 255 U.S. 22, 31, 65 L. Ed. 481, 484, 41 S. Ct. 230." 384 U.S. at 583.[22]

In applying this test, this Court concluded:

> "Any adverse attitudes that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for."
>
> * * *
>
> "We have examined all the other claims of the defendants made against Judge Wyzanski and find

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[22]See also *Ex parte American Steel Barrell*, 230 U.S. 35 (1913).

that the claim of bias and prejudice is not made out." 384 U.S. 583.

The statute as interpreted by this Court requires, as essential elements of a disqualifying affidavit, facts and reason which give fair support to the conclusion that the Court is possessed of a personal or extrajudicial bias or prejudice against the complaining party or in favor of his adversary.

These are precisely the authorities and standards relied on by the Eighth Circuit in this matter. Section IV of its opinion is entitled "The Standard for Recusal." (Pet. App. 12a-14a). Therein the court recited the statute, cited the holding in *Berger, supra,* and the standard applied in *Grinnell, supra.* The Court accepted the truth of the facts recited in petitioners' affidavits and proceeded to determine the validity of petitioners' conclusions by examining the cited facts.

In each instance, the Court concluded that the facts relied on do not manifest a personal bias or prejudice on the part of Judge Lord. Finally, in conclusion the Court evaluated the facts of this case against the circumstances disclosed in other appellate cases, including *Berger,* where personal bias and prejudice was found, and concluded that petitioners' affidavit fails to show the requisite bias and prejudice. (Pet. App. 28a).

II.

Petitioners Argument Has no Foundation in Law or Fact.

Throughout their argument petitioners assume that Judge Lord has created an "appearance of bias." This conclusion has no factual foundation nor is it without more, legally sufficient.

The Eighth Circuit did observe that petitioners, as "advocates" viewing the Court's statements "in a somewhat partisan light," and thus magnifying the impact of any comment of the Court, may have been left with the impression that Judge Lord improperly prejudged the case. (Pet. App. 28a-29a). If this is what petitioners refer to as "appearance of bias" it falls fatally short of the requirements of the statute and the decisions of this Court. Even if "appearance of bias" was the standard to be applied in cases such as this, this subjective appearance test apparently proposed by petitioners is not supported by the cases upon which they rely.

In *Berger, supra,* the Court stated:

> ". . . that [the statute's] solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial;—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment." 255 U.S. at 35-36.

This, however, must be read in conjunction with the statute discussed and the interpretation of that statute found in the *Berger* case. Clearly there is nothing in the statute which suggests the subjective standard advanced in this case by petitioners.

Similarly, neither *Offutt v. United States,* 348 U.S. 11 (1954), nor *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968), support petitioners' theory. Neither of these cases involve the statute in question nor facts similar to those presented in this case. In the *Offutt* case the Court reaffirmed the rule that a judge, when called upon to act in a case of contempt by personal attack upon him, should ask that one of his fellow judges take his place.

In *Commonwealth Coatings Corp. v. Continental Casualty Co., supra,* the Court set aside an arbitration award because, under §10 of the United States Arbitration Act, the failure to disclose the business dealings between the prime contractor and a presumably neutral arbitrator constituted a manifest violation of the strict morality and fairness which Congress expected of them.

Finally, petitioners "appearance of bias" test totally ignores the requirements that the bias be personal and extrajudicial. While acknowledging that this is a "requirement of the statute" (Pet. 12) they contend that this requirement has been too "stringently construed" (Pet. 12) and that lower courts have "strayed" by requiring that the "extrajudicial source" be the exclusive source of the bias. (Pet. 11). Even if this were true, petitioners do not allege that the Court below improperly relied on these cases; rather, they suggest that "This concept may have found its way into the rationale of the Court below." (Pet. 12-13). Petitioners cite numerous lower court cases in which they submit that the courts have misapprehended their task in construing an affidavit filed pursuant to the statute. Petitioners are unable, however, to find one case since *Berger, supra,* in which, in their view, the court properly applied the statute or adopted their suggested "appearance of bias" test.

In short, petitioners are urging that the requirements of the statute and the standards delineated by this Court in *Berger* and *Grinnell* be ignored. They proposed instead that a judge automatically recuse himself when it appears to one party that such judge is biased, regardless of whether or not the facts relied on give fair support to that subjective conclusion. Such a test is equivalent to a pre-emptory challenge not susceptible to judicial review since it turns on

the subjective views of a party. It would allow any party, dissatisfied with the pretrial rulings, orders or statements of a court, to recuse the judge at will. Such an option might well negate substantive pretrial procedures as established in the Federal Rules of Civil Procedure and the Mannual for Complex and Multidistrict litigation.

III.

Neither the Decision of the Court Below Nor the Legal Proposition Advocated by Petitioners Presents an Issue Which Warrants Review by this Court.

As early as 1927, only a few years after the decision in *Berger*, the rule that prejudice must be personal and not based on the judge's experience garnered in the courtroom was stated in the clearest possible terms in *Craven v. United States*, 22 F.2d 605 (1st Cir. 1927), *cert. denied*, 276 U.S. 627.

> " 'Personal' is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias (or state of mind, 255 U.S. 42, 41 S.Ct. 236, 65 L.Ed. 481) against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him. Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective." 22 F.2d at 607, 608.

In the interim between the decisions in *Berger* and *Grinnell*, the Federal Judiciary consistently held that a showing of personal bias and prejudice based upon something other than what the trial judge had learned from his participation in the case was the *sine qua non* of a petition for recusal. Petitioners argue that those holdings were a departure from the standard of *Berger*. This Court had numerous opportunities to review those decisions, but consistently denied certiorari.[23]

In the Petition for a Writ of Certiorari, *Foster v. Medina*, 170 F.2d 632 (2nd Cir. 1948), *cert. denied*, 335 U.S. 909, the following argument appears:

> "We respectfully submit that the departure from the principles of the *Berger* case in Circuits other than the Second Circuit makes this case an appropriate one in which corrective action is indicated by this Court." *Id.* at 13.[24]

By its decision in *Grinnell, supra*, this Court conclusively laid to rest the contention that the lower federal courts had consistently departed from the standard used in *Berger*, by requiring that the bias complained of be personal

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[23]See *Lyons v. United States*, 325 F.2d 370 (9th Cir. 1963), *cert. denied*, 377 U.S. 969 (1964); *In Re Union Leader Corporation*, 292 F.2d 381 (1st Cir. 1961), *cert. denied*, 368 U.S. 927; *Foster v. Medina*, 170 F.2d 632 (2nd Cir. 1948), *cert. denied*, 335 U.S. 909; *Price v. Johnston*; 125 F.2d 806 (9th Cir. 1942), *cert. denied*, 316 U.S. 677; *Scott v. Beams*, 122 F.2d 777 (9th Cir. 1941), *cert. denied*, 315 U.S. 809; *Ryan v. United States*, 99 F.2d 864 (8th Cir. 1938), *cert. denied*, 306 U.S. 635; *Craven v. United States*, 22 F.2d 605 (1st Cir. 1927), *cert. denied*, 276 U.S. 627; *Chafin v. United States*, 5 F.2d 592 (4th Cir. 1925), *cert. denied*, 269 U.S. 552.

[24]A similar argument was made in the petition for Certiorari filed in *In Re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), cert. denied, 368 U.S. 927. See Petition for a Writ of Certiorari at 12-14, *In Re Union Leader Corp., supra.*

and of extrajudicial origin. Petitioners dismiss the decision in *Grinnell* with the comment that the "case merely reaffirmed the time tested rule that disqualifying bias under the statute may not be based upon a judge's rulings in the case." (Pet. 12).

A reading of the *Grinnell* decision, as well as a review of the briefs and jurisdictional statements filed therein, clearly shows that this contention by petitioners is simply not correct. The Court in *Grinnell* refers not to rulings by Judge Wyzanski, but to "adverse attitudes . . . evinced toward defendants . . . based on his study of the depositions and briefs." 384 U.S. at 583. The briefs of the various appellants-defendants, and of the United States, address themselves, at great length to Judge Wyzanski's opinions and judgments formed on the basis of the pretrial proceedings and evidence in the case before him, and to his statements to the defendants which reflected those opinions. The argument for bias and prejudice against Judge Wyzanski in *Grinnell* was not based upon his prior rulings in the case.

The ruling and facts of the *Grinnell* case closely parallel the decision of the Eighth Circuit in the present case. Additionally, the legal arguments advanced by *Grinnell* are virtually identical with those raised by petitioners in this case. The following excerpts suffice:

> "Indeed, this Court has repeatedly stated that the tribunals of this country should not only *be* impartial but should 'give assurance that they are impartial'. *Berger v. United States*, 255 U.S. 22, 35 (1921), and that 'justice must satisfy the appearance of justice'. *Offutt v. United States*, 348 U.S. 11, 14 (1954). Surely the appearance of justice requires, at a minimum, that the trier of the facts should not form his judgment

ex parte but must instead 'hear the other side' before judging the merits . . ."

* * *

"Less prejudicial statements than those made here were also held to disqualify the trial judge in *Connelly v. United States District Court*, 191 F.2d 692 (9th Cir. 1951), . . . The Ninth Circuit, . . . held the trial judge was disqualified because:

'It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality. . . .' "

"There certainly was not 'such an atmosphere about the proceedings' below that those present at the trial were given 'the assurance,' 'of fairness and impartiality'. . . ."

* * *

"Here there was not merely an atmosphere of hostility, or even of prejudice more concrete. There was not merely a failure to satisfy the appearance of justice, but a perversion of the processes of justice into a ceremonial act." Brief for Grinnell Corporation at 55-61, *United States v. Grinnell Corp., supra.*

Since the *Grinnell* decision, similar rulings have been presented to this Court by way of requests for certiorari, and review has been consistently refused. e.g., *Hodgdon v. United States*, 365 F.2d 679 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029; *Hanger v. United States*, 398 F.2d 91 (8th Cir. 1968), *cert. denied*, 393 U.S. 119.

No conflict exists among the decisions of the various Circuit Courts on the issue raised by petitioners, nor is the

decision of the Court of Appeals for the Eighth Circuit at variance with the applicable decisions of this Court. In light of the lack of factual and legal support for the petition herein, and the prospect of further delay in these important and complex cases by such further interlocutory review, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

MAY 18 1972
MICHAEL RODAK, JR., CLERK

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY,

Petitioners,

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Respondents.

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY,

Petitioners,

—against—

HONORABLE MILES W. LORD, United States District Judge for the District of Minnesota, STATE OF KANSAS and NAMED PLAINTIFFS IN FORTY-EIGHT OTHER CASES,

Respondents.

REPLY BRIEF FOR PETITIONERS

Petitioners submit this brief in reply to two assertions made in the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, filed May 8, 1972.

1. Respondents criticize the "appearance of bias" test urged by petitioners as "subjective" and "equivalent to a pre-emptory challenge not susceptible to judicial review. . . ." (Respondents' Brief at 17-19) On the contrary, the test we urge on the authority of *Berger* v. *United States*, 255 U.S. 22 (1921), is whether the facts and reasons alleged in a disqualification application give "fair sup-

port" to a party's apprehension of bias and constitute a "substantial and formidable" showing of that bias and prejudice. Such a test is neither subjective nor peremptory, for it focuses judicial inquiry upon objective aspects of a judge's conduct to determine whether, on the basis of the averments in the application, there is reasonable cause to conclude that bias or prejudice appeared to be present. It is the standard applied, erroneously we submit, by the Court of Appeals that is subjective, for that standard requires speculation as to the source and nature of the judge's prejudice and necessarily involves the courts in an analysis of the judge's mental state.

The findings of the Court of Appeals, set forth at 6-8 of the Petition, demonstrate that objective appraisal of the conduct of Judge Lord provides ample basis for concluding that he appeared to be biased. Indeed, as the Eighth Circuit stated at the conclusion of its decision:

> "A trial judge, unless he carefully weights his pretrial comments, may very well leave the impression that he has improperly prejudged the case, a situation which seems to have occurred here. It is important that the litigant not only actually receive justice, but that he believe that he has received justice. A judge, like Caesar's wife, should be above suspicion.
>
> "Finally, we must consider respondents' motion for damages. We initially observe that this is a close case. We are convinced of petitioners' sincerity and good faith in filing their affidavits even though we have ruled adversely to their contentions. Clearly, some of Judge Lord's remarks have unnecessarily shaken petitioners' confidence in his impartiality. Accordingly, we deny respondents' motion for damages and costs.

> "Although we deny the petition for recusal, we add a caveat. This record adversely reflects upon Judge Lord's conduct during the pretrial proceedings. Reluctantly, we have pointed out his shortcomings in this case. We demand of Judge Lord, as we do of every trial judge in this circuit, a high standard of judicial performance with particular emphasis upon conducting litigation with scrupulous fairness and impartiality. We commend to Judge Lord the Socratic definition of the four qualities required of every judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially." (Petition at 29a)

Application of the "appearance of bias" test to the facts found by the Court of Appeals compels disqualification in this case. Plainly it would not, as respondents contend, sanction the equivalent of a peremptory challenge turning on the subjective whim of a party.

2. Respondents assert that petitioners can find no case since *Berger* which adopted the "appearance of bias" test. While we believe that *Berger* and the legislative history of the statute are sufficient authority (see Petition at 8-10), we point out that there are cases which read *Berger* as petitioners do and adopt and apply this test in clear and unmistakable terms. In *United States* v. *Quattrone*, 149 F.Supp. 240 (D.D.C. 1957), the court said:

> "'When there is ground for believing that such unconscious feeling may operate in the ultimate judgment, *or may not unfairly lead others to believe they are operating*, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. *The guiding consideration is that the administration of justice should reasonably appear to be disinterested*

as well as so in fact.'" (Emphasis in original) 149 F.Supp. at 242, quoting from the statement of Frankfurter, J., in *Public Utilities Commission* v. *Pollack*, 343 U.S. 451, 466-67 (1952).

Accord, *Whitaker* v. *McLean*, 118 F.2d 596 (D.C. Cir. 1941) ("the policy underlying [the statute] is that the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; *i.e.*, shall appear to be impartial" (quoting *Berger*)); *Connelly* v. *United States District Court*, 191 F.2d 632, 637 (9th Cir. 1951) ("there . . . shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality"); *Schmidt* v. *United States*, 115 F.2d 394, 398 (6th Cir. 1940) ("to eliminate the 'chance' that [unfairness permeated the trial] . . . the judgment should be reversed and the cases remanded for further proceedings before another judge").

The United States, one of the respondents here, has likewise taken the position that appearance of bias is sufficient to disqualify under the statute. In *United States* v. *Bryan*, 393 F.2d 90 (2d Cir. 1968), the Government urged that even if the disqualifying affidavit fell short of establishing actual bias, disqualification was required if it showed the reasonable appearance of bias: "The salutary rule of the courts is that disqualification is required where an appearance of partiality has been given." Brief for Petitioner United States at 39, *United States* v. *Bryan*, *supra*. The Second Circuit found it unnecessary to pass upon the allegations of actual bias in the Government's petition because it held that retrial should be had before a different judge in order to minimize "even a suspicion of partiality". 393 F.2d at 91.

Conclusion

For these reasons, and the reasons stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

PFIZER, INC., ET AL., PETITIONERS

v.

HON. MILES W. LORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 3a-30a) is not yet reported. The district court did not render a written opinion.

JURISDICTION

The court of appeals entered its judgment on February 15, 1972 (Pet. 2a). The petition for a writ of certiorari was filed on April 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the facts alleged in petitioners' affidavit, in support of their motion for the recusal of the re-

spondent district judge, establish that he was personally biased or prejudiced against them.

STATUTE INVOLVED

28 U.S.C. 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

STATEMENT

Petitioners seek the recusal of the respondent Lord as the district judge presiding over fifty-six related antitrust suits which were assigned to him initially by the Judicial Panel on Multidistrict Litigation. In these suits, the various complainants charge the petitioners with committing fraud on the Patent Office and conspiring to exclude competition and to fix prices for broad spectrum antibiotics in violation of the Sherman Act. The private plaintiffs seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15; the United

States seeks single damages pursuant to Section 4A of the Act, 15 U.S.C. 15a, from all the petitioners and seeks cancellation of the patent for tetracycline issued to petitioner Pfizer.

This litigation had its inception in a proceeding the Federal Trade Commission instituted in 1958 charging that Pfizer made false statements to the Patent Office and withheld information from it to obtain its patent on tetracycline; that petitioner Cyanamid and Bristol withheld information from the Patent Office; and that all the petitioners conspired to maintain arbitrary prices and to exclude competition in the broad spectrum antibiotic market in violation of Section 5 of the Federal Trade Commission Act. The Commission divided two to two on the price fixing charges but found that petitioners Pfizer and Cyanamid made misrepresentations of material facts to the Patent Office and thereby obtained a patent for Pfizer which otherwise would not have been issued. This finding was upheld by the court of appeals. *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (C.A. 6), certiorari denied, 394 U.S. 920.

Three years after the Commission commenced its proceeding, the petitioners were indicted for violating Sections 1 and 2 of the Sherman Act. The jury convicted them, but the convictions were reversed on the basis of error in the trial court's charge to the jury. *United States* v. *Chas. Pfizer & Co.*, 426 F.2d 32 (C.A. 2), affirmed *per curiam* by an equally divided court, 404 U.S. 548.

The first private antitrust suits were filed in 1963 and 1964. Following the verdict in the criminal case,

more than 140 new actions were filed. In 1968 the Judicial Panel on Multidistrict Litigation transferred all these actions to the Southern District of New York for coordinated pretrial proceedings pursuant to 28 U.S.C. 1407. The majority of these cases were later disposed of by a settlement approved by the district court. See *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710 (S.D.N.Y.), affirmed, 440 F.2d 1079 (C.A. 2), certiorari denied, 404 U.S. 871.

In December of 1970 the remaining "non-settling" cases were assigned by the Judicial Panel to Judge Miles W. Lord for pretrial proceedings. In May of 1971 Judge Lord, sitting in the Southern District of New York by designation of the Chief Justice, transferred the majority of those cases to Minnesota for trial. In September 1971, shortly after the transfer to Minnesota was upheld,[1] the petitioners filed a motion seeking Judge Lord's recusal (Pet. 31a–33a), accompanied by a joint affidavit setting forth allegations of bias and prejudice (Pet. 35a–57a). Judge Lord denied the motion. Petitioners then sought mandamus in the court of appeals.

The court of appeals refused to issue the writ. After reviewing the lengthy background of this litigation (Pet. 5a–9a) and the law governing recusal (Pet. 12a–14a), the court examined at length the incidents which petitioners claimed in their affidavit demonstrated Judge Lord's "personal bias and prejudice" and held that they were legally insufficient to require disqualification.

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[1] On July 13, 1971, the Court of Appeals for the Second Circuit upheld the transfer, *Pfizer, Inc.* v. *Lord*, 447 F. 2d 122 (C.A. 2).

ARGUMENT

This case presents no important legal issues but only the correctness of the application of established principles to the particular facts. The standards governing the recusal of federal judges under 28 U.S.C. 144 are well settled, and the court of appeals, upon a careful analysis of the record, concluded that the district judge properly had declined to recuse himself. There is no occasion for further review of these essentially factual issues.

1. The statute requires that a party seeking to recuse a district judge file an affidavit showing that the judge has a "personal bias or prejudice" against it or in favor of an adverse party. The judge before whom such an affidavit is filed must accept the factual statements therein; the question for him to decide is the "legal sufficiency" of the affidavit, *i.e.*, whether "the reasons and facts for the belief the litigant entertains * * * give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U.S. 22, 33–34; see *United States* v. *Grinnell Corp.*, 384 U.S. 463, 580–583; *Peacock Records* v. *Checker Records, Inc.*, 430 F. 2d 85, 88 (C.A. 7), certiorari denied, 401 U.S. 975.

In order to be disqualifying, the alleged bias or prejudice must be "personal," that is, it must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp., supra*, 384 U.S. at 583; see

Hodgdon v. *United States*, 365 F. 2d 679, 866 (C.A. 8), certiorari denied, 385 U.S. 1029; *Tynan* v. *United States*, 376 F. 2d 761, 765 (C.A.D.C.), certiorari denied, 389 U.S. 845. Indiscreet expressions,[2] irritation at a party's dilatory tactics,[3] or hostility toward counsel,[4] do not establish the *personal* bias and prejudice which the statute requires for disqualification.

2. The court of appeals correctly held that under these standards the facts presented in petitioners' affidavit did not give "fair support to the charge of [personal] bias and prejudice" (Pet. 43a), and that Judge Lord therefore had properly declined to recuse himself. Neither of the two grounds for disqualification upon which petitioners principally relied required recusal.

a. Petitioners allege that Judge Lord's conduct during the deposition of Harvey Edelblute reflected personal bias and prejudice. Edelblute, who had prosecuted American Cyanamid's tetracycline patent application, is an important witness in this litigation and Judge Lord was present at the taking of his deposition.[5] According to petitioners, Judge Lord improperly "interrogated the witness" and acted as an "advocate for plaintiffs" (Pet. 39a).

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[2] *In re Lisman*, 89 F. 2d 898 (C.A. 2).

[3] *Refior* v. *Lansing Drop Forge Co.*, 124 F. 2d 440 (C.A. 6), certiorari denied, 316 U.S. 671.

[4] *Sanders* v. *Allen*, 58 F. Supp. 417 (S.D. Calif.).

[5] The court of appeals noted (Pet. 15a, n. 7) that 28 U.S.C. 1407(b) specifically contemplates the appointment of judges to preside at depositions in multi-district litigation. See also *Manual for Complex and Multi-district Litigation* § 2.32 (as revised May 18, 1970).

The court of appeals, upon reviewing the complete transcript of the deposition (which exceeded 1,000 pages) and tape recordings of a portion thereof, correctly concluded that Judge Lord's conduct at the deposition did not demonstrate personal bias or prejudice (see Pet. 17a–18a). As the court of appeals noted (Pet. 18a), a trial court has a duty to conduct judicial proceedings "'with a view to eliciting the truth'" and to ensuring "'that the issues are not obscured'" (Pet. 17a),[6] and to question a witness "in order to clarify facts and issues." "[M]uch of the difficulty," the court concluded, "was caused by the compound questions asked by the attorney for the United States who interrogated Edelblute" and by Edelblute's failure to "respond directly to the questions asked, even when they were asked in a clear-cut manner" (Pet. 16a). The judge's participation in the questioning of Edelblute and his comments did not require his recusal.

b. Petitioners also contend that Judge Lord's statements raising questions with respect to whether a proposed settlement of the suit between petitioners and the United States would be in the public interest manifested personal bias and prejudice against them. The proposed settlement contemplated the dismissal of Count I of the government's complaint, which alleged that Pfizer had committed fraud on the Patent Office in obtaining the tetracycline patent and sought cancellation of the patent. Since only the government can

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[6] See *Knapp* v. *Kinsey*, 232 F.2d 458, 466 (C.A. 6), certiorari denied, 352 U.S. 892; *Fidelity & Deposit Co. of Maryland* v. *Bates*, 76 F.2d 160, 170 (C.A. 8).

obtain the cancellation of a patent procured by fraud on the Patent Office (see *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 175), Judge Lord correctly noted that Count I was "'fraught with public interest'" (Pet. 21a, n. 9). In these circumstances, it was appropriate for him to inquire about the terms of the proposed settlement and whether it would be presented to him for approval—particularly since the previous settlements in this litigation had required court approval. See *West Virginia* v. *Chas. Pfizer & Co.*, *supra*.

The inquiry also was proper because of the Judge's concern whether Pfizer's enforcement of the patent had involved fraud on the courts. Pfizer had instituted more than 35 infringement suits, at least five of which were brought in the Southern District of New York where Judge Lord had sat in the earlier stages of this case. See *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757, 817 (C.A. 6). Since many of these cases had been settled with judicial approval, and since the government proposed to settle the only case that could result in cancellation of the patent as fraudulently procured, it was appropriate for Judge Lord to be concerned with whether judicial enforcement of the patent had constituted a fraud on the court (see *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245–251) and if so what the proper duties of the court and the United States might be in light of the proposed settlement. See *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U.S. 575, 580–581.

To whatever extent Judge Lord's comments with respect to the patent aspects of the case reflected hos-

tility, it was directed not against the petitioners but against the United States and the Patent Office and was based on information he had received in handling these cases. If Judge Lord "misconceived" his role in considering the settlement (Pet. 24a), that at most reflected an erroneous view of his authority and did not reflect personal bias or prejudice against petitioners. See *Ex Parte American Steel Barrel Co.*, 230 U.S. 35, 44.

3. Petitioners, relying upon the court of appeals' statement that "advocates construe statements of a trial judge in a somewhat partisan light and thus magnify the impact of any comment of the court" (Pet. 28a), argue that Judge Lord's actions here at least created an "appearance of bias and prejudice" which should have caused his recusal (Pet. 8). The court of appeals, however, did not conclude, as petitioners assert (Pet. 2), that Judge Lord "has caused the petitioners reasonably to believe that he 'has improperly prejudged the case.'." Rather, the court held that any "impression" petitioners might have formed that the judge was personally biased and prejudiced against their clients was, on the basis of what he actually said and did, unjustified (Pet. 28a–29a).

Although counsel frequently believe, because of what a trial judge states during the proceedings, that he is personally biased and prejudiced against their client, such belief does not warrant recusal. To the contrary, recusal is warranted only if the facts stated in the affidavit give "fair support" to the charge (*Berger* v. *United States, supra,* 225 U.S. at 33).

The court of appeals specifically applied that standard and concluded that petitioners' affidavit did not provide "fair support" for their charge of personal bias and prejudice. Judge Lord had gained extensive knowledge of these cases since they had been assigned to him in December 1970; he had entered more than 85 pre-trial orders.[7] However petitioners may have interpreted some of his comments and actions, they stemmed not "from an extrajudicial source" but reflected only "what the judge learned from his participation in the case" (*Grinnell, supra*). They did not require his recusal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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MAY 1972.

[7] Class action orders 1 through 25; discovery orders 1 through 16; miscellaneous orders 1 through 26; administrative orders 1 through 19.

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